THE LAW REPORTER.

OCTOBER, 1843.

THE ATTACK ON THE JUDICIARY OF MASSACHUSETTS.

There has not been, we believe, since the adoption of the constitution of Massachusetts, any act of the legislature so bad in principle, and so baneful in effect, as the act of the last session, entitled, "An act establishing the salaries of certain public officers." This statute, under a harmless title, importing only an ordinary act of legislation, vitally impairs the great work of the framers of our constitution, and essentially changes the character of the government under which we live. These remarks are intended to apply exclusively to that part of the act, which purports to take away from the chief justice, and the justices of the Supreme Judicial Court considerable portions of their respective salaries, which have been established by law, and received by the successive judges for more than thirty years. In the course of our remarks, for the sake of brevity, we shall refer to the act in general terms, but intending always and exclusively that portion of it, which affects the judges of the Supreme Court. With the rest of the act it is not our purpose at this time to deal, it may be entitled to approval, it may deserve censure, we leave it untouched. But to that part which, if maintained, directly and completely destroys the independence of the Supreme Court, the bulwark of the constitution, we ask the candid attention of every one, who values our frame of government as modeled by the wisdom and patriotism of our fathers.

Questions as to the expediency of measures, whether there shall be, or shall not be, a state tax, may be in themselves important,

and greatly agitate the public mind; but all such questions sink to insignificance in comparison with the question, whether or not the constitution shall be disregarded and trampled on. Unwise legislation troubles the stream, breaches of the constitution destroy the fountain. This instrument in wisdom prescribes salutary limits to the power of the legislature, but there is a constant tendency in the legislature to overleap these limits. Courts, it is said, listen with but small complacency to arguments in favor of limitations of their jurisdiction; certain it is, that legislatures are apt, quite too apt, to turn a deaf ear to arguments in restraint of their power. They "feel power, and forget right." In this very case it was amazing and alarming, to see how little regard was paid by the majority of the legislature to the objection, that they were overleaping their constitutional limits. But it is a solemn truth, whether heeded by the legislature or not, that the act is a gross and palpable violation of the constitution, as can be clearly and fully shown.

But before discussing that point, it may be well briefly to consider the amount of the salaries, which have been reduced. Were the salaries too large? The constitution provides, that the judges of the Supreme Court shall have "honorable" salaries. Though the term "honorable" does not define the exact sum, yet it has an important meaning. It is opposed to a bare, stinted living. It is a term of enlargement, and not of diminution. The salaries shall be honorable, in reference to the important duties to be performed, and the high character of the men whose services are required. What are the duties, and what must be the character of the man, who holds the high and responsible station of judge of this court? Property, character, life, everything that men hold dear in this world, come within his jurisdiction, and are subject to his judgment. The people of Massachusetts have not been, and are not, willing to commit their highest interests to any but the ablest and purest hands. The popular sentiment in this commonwealth always has been, and, it is believed, now is, just and sound on this subject. The people expect and require that their Supreme Court should be composed of men of eminent ability, and spotless integrity. They are willing to confide their dearest interests to none other. The profound and complicated science of law, the vast and various interests of a community like ours, imperiously demand, that the highest judicial tribunal should consist of men of great ability and learning, and of stern and unwavering integrity. Such men, the judges of our Supreme Court at present undoubtedly are, and such they always should be. The public

have great reason to be satisfied with, and proud of these excellent magistrates. They are eminently qualified for the places they fill. They have the entire and unqualified confidence of the public. The people repose in peace and contentment under their administration, and are hardly aware of the value of the security which is felt under such a tribunal. But judicial life and labors excite, comparatively, but little of public attention and remark. The politician is continually parading himself before the public, and his partisans are noisy and clamorous in his praise. The public eye and the public ear are engrossed, (with how much profit this is not the time to inquire,) with political men and political things. But if the character and services of the judge are less blazoned abroad, yet, like the silent power of gravitation, which regulates the movement of worlds, and holds the planets in their spheres, they are constantly felt. They are felt in the vindication of private right, in the preservation of public order, and in maintaining the supremacy of the law. These are the direct and constant fruits of the official labors and services of the judges. But they do more. By their example, public charges to the juries, and in various ways, by words and deeds, they enlighten public sentiment, and elevate and purify public morals.

But it is said, forsooth, that for such men and such services, the salaries were too large! Too large for what? For the abilities, learning, and virtue of the judges! Why these, if employed for their own profit, instead of the benefit of the public, would earn them greatly more than their salaries. Too large for the services rendered? The value of these cannot be measured by money. Too large for the time employed? It is well known to all familiar with courts, that the labor of the judges of the Supreme Court, is incessant, and their duties most arduous and responsible. We believe there are but few, if any men in this community, of any class or description, who are more constantly employed in their business, than are these judges in the discharge of their official duties. Were they too large because they enabled the judges to live extravagantly, or to grow rich? To say this, would indeed be a cruel mockery. We doubt much whether most of the judges could save anything beyond the actual expenses of present living. They might, possibly, by the strictest economy and prudence, save a little, and but a little, for the wants of infirmity and age. Was this beyond the "*honorable*" salaries prescribed by the constitution? We submit that it was not a farthing beyond, if it even came up to that standard. Less salaries will not command the services of the few, very few, men who are qualified for this high station. With

the reduced salaries inferior men will assuredly occupy the bench, and the inconsiderable sum saved will be at the sacrifice of the high character of the court.

But it has been said, that judges in some other states, are not paid so much. If judges in other states, under similar circumstances, are not paid so much, then their salaries do not come up to the standard prescribed by our constitution, and the examples should be shunned and not followed. But if public opinion is to settle the question, we confidently appeal to the opinion of the people of the commonwealth of Massachusetts, as expressed by acts of their legislatures, by them approved and ratified. The first act on the subject after the constitution was in 1781. It recites the provision of the constitution for honorable salaries, and fixes the salary of the chief justice at three hundred and twenty pounds, and of the other justices at three hundred pounds each. But when these permanent salaries were deemed inadequate, annual or temporary additions were made to them. The right of the legislature, however, to make such temporary grants was always questioned. The next act was in 1790. It repealed the first, and reciting the provisions of the constitution for honorable salaries, and that the salaries before established were found inadequate for the honorable support of the judges, enacted that the sum of three hundred and seventy pounds be established for the chief justice, and three hundred and fifty for each of the other justices. To these last salaries annual or temporary additions were from time to time made by the legislature, as deemed fit and reasonable, from the increase of their services, or other causes; these temporary grants, however, being always disputed, on the ground that the judges were thus held dependent on the legislature for a considerable portion of their salaries, when by the constitution the whole should be permanent. The next act was passed in 1806. It recites the provision in the constitution for honorable salaries, and fixes the salary of the chief justice at twenty-five hundred dollars a year, and of each of the other justices at twenty-four hundred a year. An act in addition to this was passed in 1809. By this act the sum of one thousand dollars was added to the existing salary of the chief justice, and six hundred dollars to each of the other justices; thus making the salary of the chief justice three thousand five hundred dollars, and that of each of the other justices three thousand dollars.

Thus they stood, when, for the first time in the history of the government, the legislature undertook to take away portions of

these established and permanent salaries, by the act upon which we are commenting.

The act of 1809, which raised the salaries to the highest sums, is entitled to great consideration. It was passed after the establishment of the present judicial system separating the terms for the trial of questions of law and of fact, and authorizing one judge to hold a court for trials by the jury. This was not a party measure, but was supported by members of both political parties. It had the warm and hearty support of a member of the legislature, whose judicial character at the present day sheds a lustre on our whole country, and whose fame is bounded only by the limits of the civilized world. He was then a leading member of the democratic party, and his efforts to give effect to the express requisition of the constitution by making suitable provision for the judges of the Supreme Judicial Court, will ever hold a high rank in the list of the good deeds of his eminently useful and honorable life. Though his opinion on this subject may not have all the authority of his judicial decisions, yet the opinion of such a man, formed and expressed under the sanction of his official responsibility as a legislator, is certainly entitled to the most profound respect. This act was approved and ratified by the people of the commonwealth, and had remained undisturbed for twenty-seven years, at the time of the revision of the statutes in 1836, at which last time it of course came under the deliberate consideration of the able and excellent commissioners to whom the business of revision was committed, and of the legislature, and of the people, and was again deliberately ratified and confirmed. Not a man in the commonwealth complained that these salaries were too large.

The case then stands thus, in regard to the amount of the salaries which have been reduced. Taking the standard prescribed by the constitution, considering the importance of the duties to be performed, and the character and qualifications of the men whose services were required, they were not a farthing too large, if they were even large enough. Then, again, the amounts were fixed by the concurrent votes of both political parties, it being no party measure, regard being had to the constitution and the public good only. These amounts have been fully approved and paid by the public for more than thirty years, the period of an entire generation, without the slightest objection; and within a few years, the subject has been revised, and reconsidered, both by the legislature and the people, and renewedly approved and confirmed without the slightest doubt or hesitation.

The question seems therefore to have been as fully and solemnly

settled as any question can be. The reduction is not placed on the ground of any change of circumstances, so that although the sums were not originally too large, yet that subsequent changes and events render it proper that they should be reduced, but simply on the ground that they were always too large. This wont do. It is quite too absurd and monstrous. The discovery comes too late. Are the judges of the Supreme Court never to be at rest? Are their salaries to be cut down to meet the changing views of a continually changing legislature? After eminent men have been induced to leave their professions, and give up large incomes to engage in the public service, is it equitable, is it honest, to take away their established compensation?

If it be possible, in the nature of things, definitively to settle and determine what sums, the requisition of the constitution and all other things considered, ought to be paid to the judges of the Supreme Court, those sums had been understandingly ascertained and firmly established. No principle of retrenchment could reach them. There was nothing to retrench. There was nothing but what was justly due and fully and repeatedly admitted to be due, both by legislatures and the people. To reduce these sums was, therefore, unjust both to the judges and the people.

But it was something more than unjust. It was a glaring and flagrant breach of an engagement on the part of the legislature with the judges. If a man, at the request of the public, engages to discharge, for a limited term or for life, the duties of an office, to which an ascertained and fixed salary is attached, there would surely seem to be an implied engagement, that he shall receive the same salary so long as he performs the duties. This would seem to result from the plainest principles both of law and reason. But it is not necessary to go at large into this subject for our present purpose. The right of the judges, in the present case, to the continuation of the salaries attached to their offices, when accepted by them, does not rest merely on any implied contract, though that might be amply sufficient. They have the express and solemn engagement of the legislature that their salaries should continue so long as they remained in office. This engagement, on the part of the legislature, the judges have in no way cancelled or released, and it still remains in full force and virtue. The statute of 1806 recites, that the constitution requires that *permanent* and honorable salaries should be *established by law* for the justices of the Supreme Judicial Court, and enacts that the salary of the chief justice of said Supreme Judicial Court shall be the sum of two thousand five hundred dollars, and of the other justices thereof the sum of two

thousand four hundred dollars respectively, "*for every year during their continuance in office.*" The act of 1809 was in addition to the act of 1806, and enacts that there shall be paid to the chief justice of the Supreme Judicial Court the sum of one thousand dollars, and to each of the other justices the sum of six hundred dollars, "*for every year during their continuance in office,*" in addition to the respective salaries as now established by law. Thus the two acts provide that the salary of the chief justice shall be thirty-five hundred dollars, and that of the other justices three thousand each, and that these salaries shall continue *so long as they shall remain in office.* These acts are as strong, quite as strong, as that of 1 Geo. III., which provides that the salaries settled on the judges "*shall be fixed during the continuance of their patents, or commissions,*" by force of which the English judges are as secure in the enjoyment of their salaries as any private individual is in the enjoyment of his private property. No power can reach them.

The language of our statutes is positive and unqualified, — "*for every year during their continuance in office.*" These acts were both in full force when the act under consideration was passed. They were in force when the present judges were appointed. They left an honorable profession, in which they respectively held a high rank, and had a large and lucrative practice, and accepted their offices relying on the good faith and express promise of the legislature, that the salaries as then established should continue so long as they remained in office. Could there be a more clear, express, solemn and binding contract than this? We do not believe a jury could be found in any county in this commonwealth, who would not decide this to be an express and binding contract. And yet, in despite of all this, the legislature, upon their own motion, without the consent of the judges, set the contract at defiance and reduce the salaries. It would seem as if there must be some misapprehension or mistake in this matter. If there be not, this is nothing less than rank, unblushing repudiation. We appeal to every right-minded man, if this be not so. The contract is clear and express, and the refusal to perform it is distinct and positive. And has it come to this? The old Bay State, the land of the pilgrims and puritans in the list of repudiators! To say nothing of the justice, is it honorable, does it become the character of Massachusetts, to violate her engagement with her faithful public servants, who have no means of redress, because the state cannot be sued. We trust the people will disclaim this unworthy act, and wipe off this stain from the character of our ancient and venerable commonwealth.

Enough, we believe, and more than enough, has already been shown, to satisfy any reasonable mind that the law is unreasonable and unjust. But, by far the most serious objection to it remains to be considered. Does it not violate the constitution, by destroying the independence of the judges of the Supreme Judicial Court, which is secured to them by that instrument? This is a question of most serious import. It should not be treated in the manner of an ordinary topic of party politics. Its effect is not temporary and transient, but will last as long as our present political existence continues. It affects the safety of the ship in which we are all embarked, and with which, if it sink, we must all go down, without distinction of party. We have no party feeling, or party purpose, in relation to this question. We appeal to the members of all parties, who regard the preservation of the constitution as of more importance than the promotion of the temporary interest of a party. He must have been but an ill observer of the signs of the times, who has not noticed a disposition, as well in our national legislature as in the state legislatures, to bring the judiciary into subjection to the legislative power. We do not believe that the people of this commonwealth desire to see their supreme court reduced to such a condition. The act in question is without precedent, and is the first instance of such a direct attack on the court. But the framers of our constitution foresaw this danger, and have fully guarded against it. The legislature must prostrate the constitution, before they can destroy the independence of the court. The men who formed our constitution had been the subjects of Great Britain, and were familiar with the history of her judiciary. To comprehend fully the intention, force and effect of the provisions in the constitution in relation to the Supreme Court, it is necessary to know something of what had been the course of events in Great Britain in relation to her judges. Before the revolution of 1688, the commissions of the judges were generally during the pleasure of the king, and they were likewise wholly dependent on him for their salaries. We say such was generally the term of their offices, because, in some instances, the judges were appointed during good behavior.

When the office was held during good behavior, the most arbitrary and tyrannical king never attempted to deprive them of their offices, it having been uniformly held and adjudged, that an office during good behavior was an office for life, determinable on misbehavior only. So in the case of *Harwick* v. *Fox*, (1 Show. 512,) where all the judges gave their opinions seriatim, it was adjudged that when an office is granted, "to execute the same for so long

time only as he shall well demean himself in the office, is an estate for life, determinable upon misbehavior of the officer." Lord Chief Justice Holt says — " 'The words themselves, 'for so long a time only as he shall behave himself well in the office,' in their natural and proper extent, do signify an estate for life." He adds, " The design of parliament was, that men should have places, not to hold precariously, and determinable upon will and pleasure, but have a *certain durable estate*, that they might act in them without fear of losing them, we all know it, and our places as judges are so settled, only determinable upon misbehavior."

But though a judge, holding his office by this tenure, could not be deprived of his office, there are instances where the king arbitrarily forbade them exercising their office, and withheld their salaries. " Sir John Walter, a man of profound learning and of great integrity and courage, was appointed lord chief baron by patent, 1 Car., during good behavior; being in the king's displeasure, and commanded that he should forbear the exercise of his judicial place in court, never after exercised his place in court; and because he had his office *quam diu se bene gesserit*, he would not leave his place, nor surrender his patent, without a *scire facias* to show what cause there was to determine his patent, or to forfeit it, so that he continued chief baron till the day of his death." Cro. Car. 203. " Justice Archer was removed by Charles II. from sitting in the Court of Common Pleas. But the judge, having his patent to be judge *quam diu se bene gesserit*, refused to surrender his patent without a *scire facias*, and continued justice of the court, though prohibited to sit there, and in his place Sir William Ellis was sworn." Sir Thos. Raym. Rep. 217. Rushworth says — " Mr. Serjeant Archer, (now living) notwithstanding his removal, still enjoys his patent, being *quam diu bene gesserit*, and receives a share in the profits of that court, as to fines and other proceedings, by virtue of his said patent; and his name is used in all those fines, &c., as a judge of that court." Thus, learned judges, against whom nothing could be alleged, and who could not, therefore, be deprived of their offices, were deprived of their salaries, because these were dependent on the will or caprice of the king. But, as we have said, generally, before the Revolution of 1688, the judges held their offices during the pleasure of the king, and were wholly dependent on him for their salaries. This, of course, made them completely dependent on the king, which occasioned evils and grievances, which pressed heavily on the people, and were deeply felt by them. In the remonstrance to the king by the house of commons, in 1641, they say, " Judges have been put out of their

places for refusing to do against their oaths and consciences; others have been so awed that they durst not do their duties; and the better to hold the rod over them, the clause, *quam diu se bene gesserit*, or during good behavior, was left out of their patents, and the clause, *durante bene placito*, or during pleasure, inserted." Before this, in 1640, the house of lords addressed the king on the same subject. Hallam says, "it had been the practice of the Stuarts, especially in the last years of their dynasty, to dismiss judges, without seeking any other pretence, who showed any disposition to thwart government in political prosecutions." As would naturally be expected, under such circumstances, the judges became the creatures and tools of the crown, and the bench was covered with infamy. No man had any security for his life, liberty, or estate.

But our limits do not allow us to dwell on this matter. The history of the times is full of instruction and warning on the subject. The evils arising from a dependent judiciary were among the evils which produced the Revolution. Hallam says, "that in the debates previous to the declaration of rights, several speakers insisted on making the commissions of the judges during good behavior, instead of the pleasure of the crown. But this was omitted in the hasty and imperfect bill of rights." But when William came to the throne, the commissions to his judges ran during good behavior. But still they were dependent on the crown for their salaries. To remedy this, in 1692 a bill passed both houses of parliament to secure to the judges their salaries, and to put it out of the power of the king to take them away. But, unhappily, the king, clinging to his bad prerogative, refused his assent to the bill. Still it was an object, dear to the nation, to secure the independence of their judges by positive law; and this object was not lost sight of, till it was fully accomplished by the act of settlement, 12 and 13 W. 3, c. 2. By this act it was expressly provided, "that judges' commissions be made *quam diu se bene gesserint*, and their salaries *ascertained and established*."

We believe it to be certain, that ever since the passing of that act, it has been universally considered and admitted, that by force of the word "established," that act so fixed and secured to the judges their salaries, as to leave them wholly independent of the king or crown in that respect. There can be no doubt, therefore, what was the meaning of the word "established," as used in that act. There remained but one thing more which could be done to secure the greatest possible independence to the judges. Though independent in the tenure of their offices, and in their salaries, yet

on the demise of the crown, or within six months after, their commissions ceased, and they were liable to be displaced by the new sovereign, and were therefore dependent on the heir apparent for their continuance in office after the death of the king. But even this dependence was taken away by the voluntary and noble act of George III. That king, upon his accession, after stating to parliament that, on granting commissions to the judges, the tenure of their offices attracted his observation, and that, notwithstanding the act of W. 3, their offices determined on the demise of the crown, or six months after, proceeds thus: "I look upon the independence and uprightness of the judges of the land as essential to the impartial administration of justice, as one of the best securities to the rights and liberties of my loving subjects, and most conducive to the honor of the crown; and I come now to recommend this interesting object to the consideration of parliament, in order that such further provision may be made for securing the judges in the enjoyment of their offices during their good behavior, *notwithstanding any such demise,* as shall be most expedient. I must desire of you, in particular, that I may be enabled to grant and establish upon the judges such salaries as I may think proper, *so as to be absolutely secured to them during their commissions.*" The act of 1 George III. was accordingly passed, continuing the judges in their offices notwithstanding the demise of the crown, and *securing to them their salaries during their commissions.*" How different was the conduct of the king, seeking to establish the independence of the judges, beyond the power of the crown, in any event, from the conduct of our legislature, seeking to destroy the independence of our judges as established by our constitution.

We thus see, how dear an object it had been to the English nation to secure the independence of the judges, both as to the tenure of their offices and their salaries, and how effectually this object had been accomplished. The framers of our constitution were learned and able men, many of them eminent lawyers and statesmen, who fully understood the judicial history of England. They well knew the grievances, which had been felt from a dependent judiciary, and the manner in which those grievances had been removed. To suppose that, under such circumstances, they deliberately framed a constitution of government, which should perpetuate to themselves and their posterity the evils of a dependent judiciary, would be doing signal injustice to their memories. They deserve no such reproach. That they felt the importance of the entire independence of the Supreme Judicial Court, and intended to place it on the rock of the constitution, and secure it as

safely as parchment barriers could secure it, is most manifest from the whole tenor and provisions of that instrument.

The thirtieth article of the Bill of Rights provides, that, "in the government of this commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them. The executive shall never exercise the legislative and judicial powers, or either of them. The judicial shall never exercise the legislative and executive powers, or either of them: to the end, that it may be a government of law, and not of men." The 'Federalist' has the following very appropriate remarks on this subject. "Next to permanency in office, nothing can contribute more to the independence of the judges, than a fixed provision for their support. The remark made in relation to the president is equally applicable here. In the general course of human nature *a power over a man's subsistence is a power over his will*, and we can never hope to see realized in practice the complete separation of the judicial from the legislative power, in any system, which leaves the former dependent for pecuniary resources on the occasional grants of the latter." The twenty-ninth article declares, "It is essential to the preservation of the rights of every individual, his life, liberty, property, and character, that there be an impartial interpretation of laws and administration of justice. *It is the right of every citizen to be tried by judges as free, impartial, and independent, as the lot of humanity will admit.* It is therefore not only the best policy, but for the security of the rights of the people and of every citizen, that the *judges of the Supreme Judicial Court* should hold their offices as long as they behave themselves well." Again, it is provided, chap. iii. art. 1, "That all judicial officers should hold their offices during good behavior, excepting such concerning whom there is different provision made in the constitution." The constitution makes no different provision in regard to the judges of the Supreme Judicial Court; a stronger declaration in favor of the entire independence of the Supreme Court could not be made. Thus far we have the judicial department a distinct, independent department of government, and the judges of the Supreme Court secured in their offices during good behavior, which is an estate for life, subject to be defeated by misbehavior only.

Nothing, therefore, remains to make the judges "as independent as the lot of humanity will admit," but to make them independent in the enjoyment of their salaries. It would have been strange indeed if the framers of the constitution had left them dependent on the will and pleasure of the legislature for their salaries. They have not so left them. The twenty-ninth article of the Bill of

Rights provides, *in regard to judges of the Supreme Judicial Court*, "that they should have honorable salaries *ascertained and established* by standing laws." The word *establish* is defined by lexicographers to mean, "to set and fix firmly or unalterably; to settle permanently." Such also is the common and ordinary acceptation of the term. This meaning is fully confirmed in chap. ii. sect. 1, art. 13, of the constitution, which declares "*permanent* and honorable salaries shall also be established by law for the *justices of the Supreme Judicial Court*." But what puts the meaning of the word *established*, as used in the constitution, beyond all doubt, is the fact that the terms used in the twenty-ninth article of the Bill of Rights, that the judges of the Supreme Judicial Court shall have honorable salaries "*ascertained and established*," are precisely the same terms used in the statute 12 and 13 W. III., before referred to, and were doubtless used for the same purpose, and should therefore receive the same construction in both cases. Now, therefore, as the judges of England, by the statute of William, were made independent of the crown as to their salaries, so, by our constitution, the *judges of the Supreme Judicial Court*, as to their salaries, are made independent of the legislature. In chap. iii. art 1, sect. 13, it is provided, "and if it shall be found that any of the salaries aforesaid so *established* are insufficient, they shall from time to time be enlarged as the general court shall judge proper." The occasion for this provision is manifest. It was impossible to fix, in the constitution itself, the amount of salaries, because what would be adequate at one time might, by change of circumstances, become inadequate. It was necessary, therefore, to refer to the legislature to fix the amount. But these sums, so fixed, might by change of circumstances require to be enlarged; and this power of enlargement is therefore expressly given. The legislature might be entrusted with the power of improving the condition of the judges, but not of making it worse. But if the framers of the constitution had understood that the legislature had power to alter, and even reduce the salaries at will, they surely would not have deemed it necessary expressly to give them power to enlarge them.

From this view of the constitution, which we believe to be incontrovertibly correct, it is apparent that, by that instrument, the judges of the Supreme Judicial Court are made independent of the legislature, both as to the tenure of their offices and their established salaries. The provision in the acts of 1806 and 1809, that the judges shall have the established salaries "during their continuance in office," appears to be a legislative construction of the constitution to the same effect.

The act under consideration assumes and exercises the right, on the part of the legislature, to take away, at its pleasure, any portion of the established salaries of the judges of the Supreme Judicial Court. If the legislature can take away part of the salaries, they can take away the whole. Thus the Supreme Judicial Court is prostrated in beggarly dependence at the feet of the legislature. The judges, instead of holding their offices during good behavior, hold them at the pleasure of the legislature. Here then is surely a gross violation of the constitution, and a most dangerous usurpation on the part of the legislature. The consequences of thus destroying the independence of the judiciary must be apparent and alarming to every considerate mind. Our government is a limited government. The constitution wisely imposes restraints on the legislative power; which restraints are necessary to the safety and the security of the rights of the people. But these restraints can be enforced only by the judiciary. The judiciary alone can arrest the enforcement of any unwarranted act of the legislature which may have been wantonly or inadvertently passed. Take away the judiciary, and our legislature, like the British Parliament, is omnipotent. Any man may become the victim of an *expost facto* law, or any unjust or partial law, passed inconsiderately, or by mistake, or in the recklessness of popular excitement. The minority is completely in the power and at the mercy of the majority. In the continually shifting scenes of political life, who may constitute the minority to-morrow no man can tell. The judiciary alone is our guardian and protector. To the judiciary is assigned the duty of standing up against the legislature, to protect our constitutional rights from unconstitutional enactments.

To reduce the judiciary to dependence on the legislature, what is it, but to disarm our sentinel, and blind the eyes of our watchman? Powerful as the judiciary is in protecting the rights of the people, it has no means of defending or protecting itself. It is the weakest and most defenceless branch of the government. Its power is only the power of judging. In the present instance, therefore, the judges have borne in silence the indignity and injustice inflicted upon them. There is no tribunal to which they can appeal. They have too much respect for themselves, and their high stations, to let their voice be heard amid the din of party strife. We honor their motives. Whether they will, at any time, or in any way, express their sense of the wrong done to them and the public, we know not. But, however this may be, the people should not remain silent or inactive. They should rally, without distinction of party, with one heart and one mind, to maintain to the utmost the inde-

pendence of their judiciary. They should teach their legislature in a voice that shall be heard, and in language that shall be heeded, that the limits of the constitution must, and shall be, regarded. If they do not, their constitution will become a dead letter, an useless, obliterated parchment.[1]

Recent American Decisions.

District Court of the United States, Maine, May, 1842, at Portland. In Admiralty.

WILLIAM S. PETTINGILL *v.* DAVID C. DINSMORE.

In a libel for a marine tort, the libellant must set forth, in a distinct allegation, each separate and distinct wrong on which he intends to rely, and for which he claims damages.

If he intends to rely on general ill-treatment and oppression on the part of the master in aggravation of damages, it must be propounded in a distinct allegation to enable the master to take issue upon it in his answer.

The proofs in the case must be confined to the matters that are put in issue by the libel and answer.

When a master is prosecuted in the admiralty for punishing a seaman, he may be permitted, in justification, or in mitigation of damages, to show that the seaman was habitually careless, disobedient, or negligent in his conduct.

But in order to be admitted to this defence, he must set forth such habitual misconduct in a defensive allegation in his answer, in order that the libellant may be enabled to meet the charge by counter evidence.

THIS was a libel *in personam* for an assault and battery on the high seas. The libellant shipped in October, 1841, on board the barque Massasoit, of Bath, for a whaling voyage. He was, in the lan-

---

[1] In our examination of the independence of the Supreme Judicial Court, as secured by the constitution, we have been aided by a charge delivered to the grand jury by Chief Justice Dana, some time before the act of 1806, since which no temporary grants have been made. One object of the charge was to show, that the temporary grants, by the legislature to the judges, in addition to their permanent salaries, were unconstitutional, as the judges were thus made dependent on the will of the legislature for so much of their salaries, whereas, by the constitution, the whole should be permanent. It never entered the mind of that learned judge, sagacious and far-reaching as his mind was, as a thing possible, that the legislature would ever claim the right to take away the established salaries or any portion of them.

guage of seamen, a green hand; that is, it was his first voyage as a seaman. For the first two weeks he was so much affected by sea-sickness as to be unable to perform his duty. After that time he entered on his duties, and no difficulty, or at least none of a serious nature, occurred until the 28th of November. On that day the cabin-boy, in shaking the cabin tablecloth over the side of the vessel, accidentally dropped it into the sea, and it was lost. He mentioned the fact to the steward, who told him to inform the master. The boy replied that he was afraid, and requested the steward to do it for him, who accordingly did, when the first assault complained of was made. The next morning the libellant was called on deck and seized up to the rigging, and kept so for from half an hour to an hour, which is the other wrong complained of. The material facts are stated in the opinion of the court.

J. S. Sewall and *J. Howard* for the libellant.
H. Tallman and *A. Haines* for the respondent.

WARE J. This is what, in the language of the admiralty, is technically called a cause of damage. It appears from the testimony of the libellant's witnesses, that when the tablecloth was lost by the boy, he mentioned the fact to Maxwell, the cooper, who advised him to mention it to the master. He replied, that he was afraid the master would flog him. He then advised him to inform the steward and ask him to communicate the fact to the master. This being done, the steward came on deck and informed the master. He was irritated, and answered very roughly. The steward replied that he would pay for the cloth. The master answered that he wanted no other pay than what he could get from his hide; that he had promised him a flogging, and that he would keep his promise. Pettingill replied that if he flogged him he would have satisfaction if he lived to get home; upon which the master struck him, and brought him to the deck either by the violence of the blows or by throwing him down. While down he shook him violently, brought his knees or feet upon his breast, seized him by the hair with such violence as to pull or tear a considerable quantity from his head, so as to leave a spot bare, and after holding him in this manner for some time, allowed him to get up, and ordered him into the cabin.

The next morning all hands were called aft, and the steward was called from the cabin on the quarter deck. The mate was then directed to seize him up by both hands to the rigging, with his arms spread and extended upward to their full length, and as high as they could be to leave him standing on the deck. In this

position he was kept for from half an hour to an hour. Two of the witnesses state his shirt was stripped up, so that his body was left bare. The other witnesses do not mention this fact, and the witnesses for the master deny it. While the libellant was in this position the master called the attention of the crew to him, and walked the deck forward and back apparently in great passion, applying to the steward various insulting and degrading epithets, and observed that this was what he called a spread eagle, and that he would make an example of Pettingill. Except where the hair was torn from the head there were no marks of violence apparent on the person of the steward. For two or three days afterwards he complained of a severe pain in his head, though he was not so injured but that he immediately returned to the performance of his duty. The witnesses for the master give a more subdued and mitigated account of the assault on the 28th, and of the seizing up to the rigging on the morning of the 29th. They saw no blows inflicted, no stamping or jamming with the knees or feet on the breast of the libellant, and no pulling of hair, nor did they hear any complaint of the steward; but they say that he acknowledged his fault and asked the master's pardon. But with respect to the cause or the occasion of the punishment there is no discrepancy between the witnesses.

This is the substance of the testimony so far as it applies to the allegations of the libel in the form in which it was originally drawn. But after the evidence was taken and the cause ready for a hearing, the counsel for the libellant moved for liberty to file an amendment to the libel. The amendment offered sets forth more particularly the assaults on the 28th and 29th, and also contains two new substantive allegations, one of another distinct assault in the cabin in the evening of the 28th, and another of general ill-usage and oppressive cruelty on the part of the master. The amendment is objected to on the part of the respondent.

The court, without doubt, has the power to allow an amendment in any stage of the proceedings before a final decree, when the purposes of justice require it. But a motion to amend is addressed to the discretion of the court, and when it will necessarily lead to delay and an increase of expense it will not be allowed, unless the court sees that substantial justice cannot be attained without an amendment. The practice of the admiralty does not insist on all that technical exactness in pleading, which is required by courts proceeding according to the course of common law. But the libellant is required to state in clear, distinct and intelligible allegations, the whole gravamen of his complaint. He must set forth

every material and substantive wrong upon which he intends to rely and for which he claims damage, in a distinct allegation. If he intends to claim damages for separate and independent assaults, they should be separately set forth; otherwise the respondent will not know what he has to answer. And the proofs in the case must follow the allegations. It is not intended to be said, that every circumstance of aggravation attending an assault and battery must be minutely described, but when the libellant proposes to offer proof and claim damages for separate assaults at different times, he is bound to set them out in separate allegations. And so if he means to rely on general harsh treatment and continued and systematic oppression and cruelty, either in aggravation or as an independent and substantive wrong, the libel should contain, in a separate article, an allegation to that effect, in order that the respondent may take issue on the matter and prepare his defence accordingly. *Orne* v. *Townsend*, (4 Mason's R. 541.) *Treadwell* v. *Joseph*, (1 Sumner's R. 390.) Now, in the libel as originally framed, there is no mention of an assault in the cabin, and yet it is alleged in the amendment, it can in no sense be considered as a continuation of that which took place on deck, nor is there any distinct charge of habitual ill-treatment and oppression so formally set out as to give notice to the respondent that this matter would be insisted upon as an independent ground of damages, or that it would be relied on in aggravation to enhance the damages for the assaults particularly articled in the libel. The answer is drawn to meet the allegations in the libel, and consequently neither of these matters are put in issue. If the amendment is allowed, the master must have liberty to amend his answer, and time must be given to produce evidence on the new issues presented by the pleadings. This will necessarily lead to delay, and involve an increase of expense, and as the necessity of an amendment to reach the whole justice of the case, if any such necessity exists, of which I am not convinced, was occasioned by the fault of the libellant himself, in my judgment the amendment ought not to be allowed.

The master in his answer justifies the assault as a necessary and proper act of discipline, and alleges "that, at the time, the said libellant was not obedient to the respondent's commands, but assumed and took upon himself to do and act as he saw fit, in subversion of the necessary discipline and subordination of the crew of said ship, and in a manner to destroy the objects of the voyage and produce mutiny;" and he then proceeds to state that he gently laid him down on the deck and detained him there a short time, and on his promise to conduct better he was allowed to get up; but, not-

withstanding his promise, he still manifested insubordination and insolence to the respondent, upon which he told him that he would seize him up in the rigging, and "thereupon Pettingill threatened and dared him to do so, alleging if he did, that he, the said Pettingill, would make this respondent sweat for so doing." And that afterwards, on mature consideration, the following day he did cause him to be seized up for a short time in a manner not to produce pain or injury, and that the chastisement was mild, necessary and proper.

Evidence has been offered by the master in his defence, tending to prove that Pettingill was careless and negligent in the performance of his duty. I have no doubt that evidence of general and habitual negligence and carelessness in the discharge of duty, may be admitted in justification of punishment, when in a proper case it is administered to correct such habits of sloth and negligence, and may go in mitigation of damages when it does not amount to a full justification. The right of the master to correct a seaman by some kind of punishment for habitual and systematic sloth and negligence, seems to result from his peculiar relation to the crew and the nature of the authority with which the law has entrusted him. He is invested with a sort of domestic authority, but it is of a peculiar character and of limited extent. It has an analogy to that of a parent over his children, or of a master over his apprentice or pupil, but the analogy does not hold throughout. He has not the authority of a *custos morum* to correct his crew for general immorality of conduct. His power is limited to the correction of such delinquencies as are connected with the due performance of their special duties on board the vessel. But when the law imposes on the master the responsibility for the government of the vessel and the discipline of the crew, it clothes him with an authority commensurate with his duties and responsibilities. The safety of the ship, the comfort and health of the crew, and the success of the voyage, depends on the prompt and punctual performance by each man of his appropriate duties, and it is a part of the master's duty to see that these duties are performed in a proper manner and with reasonable diligence. It would seem, then, that habitual sloth and negligence, or wanton carelessness, if persevered in, after proper admonition, may be corrected by suitable punishment. When a seaman brings a suit for damages against the master for illegal and unjustifiable punishment, he puts in issue his general conduct and character during the voyage, or rather enables the master to put it in issue. But when the master means to rely on such matter in justification or in mitigation of damages, he must set it out in his

answer in a distinct allegation. The libellant has then notice of the defence, and may be prepared to meet it. But if the answer contains no such defensive allegation, the libellant has no reason to suppose that his general conduct for the voyage is intended to be called in question. The evidence therefore to this point, in the actual state of the pleadings, is not properly admissible. But if it were in the case, it is not of such a character, in my judgment, as ought to have a material influence on the decision.

How then stands the case on the evidence that is properly applicable to the matters in issue between the parties? The cabin-boy lost a tablecloth overboard. He being, from some cause, afraid to communicate the fact to the master, at his request the steward does it for him. Whereupon, without further apparent cause, the master commences a violent assault on the steward, knocks or throws him down on the deck, shakes and jams him violently against the floor with his feet or knees, and seizes him with such force as to tear out a considerable quantity of his hair. The only offence that Pettingill had committed, was his reply, when the master told him that he would flog him, that he then would seek redress from the laws of his country. But this threat, as the master calls it, was not uttered according to his answer until after the assault on the deck; and it is represented in the answer as encouraging a mutinous spirit in the crew, and as a justification of the punishment the next day. The next morning, without any farther cause than that of avowing his intention to seek redress when he returned, and, as the master, in his answer says, for an example, he caused him to be seized up by both hands, with his arms extended, as the master facetiously remarked, like a spread eagle, and kept him suspended in that ignominious posture before the crew for from half an hour to an hour; not, it is true, in a manner to cause great bodily pain, but exposing him to derision and ridicule, and accompanying the whole with a copious effusion of taunting and opprobrious language.

I can find in the evidence no cause for this punishment except the state of irritation into which the master was thrown, by the loss of the tablecloth; and the punishment was inflicted not on the boy who lost it, but on the steward who brought him the information. Pettingill might well say, after this experience, that the "bearer of ill tidings has but a losing office," when he is obliged to expiate by a vicarious punishment in his own person the offence, which he only announced as a messenger. It is now indeed said, by the way of extenuation, that the steward was habitually remiss in his duty. But this, as has before been observed, was not relied upon in the answer, and is not properly in issue, and from the

character of the evidence which is offered in support of it, seems brought in by an after-thought as a palliation of a gross outrage that is entirely without justification. On the whole evidence the punishment appears to me to have been a wanton abuse of power, without any cause which could operate on the mind of a reasonable man, and I shall award damages to the amount of eighty dollars, with costs of suit.

District Court of the United States, Vermont, July, 1843.
In Bankruptcy.

IN THE MATTER OF ALONZO PEARCE.

The objection to a bankrupt's discharge, on the ground that he has not made a full disclosure of his property, involves a charge of fraud and perjury, and the strictest proof is required.

Held, in the present case, that the bankrupt had not been guilty of such a fraudulent concealment of his property, within the meaning and intent of the bankrupt law, as ought to deprive him of his discharge.

It is not a necessary and legal inference that a conveyance was made in contemplation of bankruptcy, merely because the debtor was insolvent at the time; but it must appear that the conveyance was made by the debtor in anticipation of breaking or failing in his business, of committing an act of bankruptcy, or of being declared bankrupt at his own instance, and intending to defeat the general distribution of his effects.

A voluntary payment or transfer by an insolvent debtor, who is going on in his business, with a *bona fide* intention and expectation of saving himself from failing, and of paying his debts, is not a preference within the meaning of the law.

But where a bankrupt was hopelessly and irretrievably insolvent, and had actually stopped business, his failing being notorious; and, when under the immediate apprehension of being committed to jail for debt by one of his creditors, he transferred a part of his property to another creditor without any request or demand on his part, and soon after became a voluntary bankrupt; it was *held*, that such a transfer was such an unlawful preference as ought to deprive the bankrupt of his discharge.

THIS was a petition by Alonzo Pearce, bankrupt, one of the partners of the firm of Walbridge, Pearce & Co., for a discharge. The material facts in the case will sufficiently appear from the opinion delivered by the court.

PRENTISS J. The objections filed in this case by the opposing creditors, although somewhat multifarious as well as numerous,

may be classed under two general heads. 1. That the bankrupt has not made a full disclosure of his property in his schedule, but has fraudulently concealed property. 2. That he has given unlawful preferences to particular creditors by certain payments, securities, and transfers of property. These two general objections seem to comprise the whole case as presented by the proofs.

1. Under the first head of objections, the concealment of property, an argument was urged with much earnestness by counsel, founded on the apparent difference between the state and condition of the partnership affairs, as exhibited by the inventory taken in April, 1840, and the state and condition of the partnership affairs as represented in the bankrupt's schedules, filed in April, 1842. It was said, that as the inventory showed a surplus of assets of between two and three thousand dollars over all liabilities, and the schedules show outstanding debts, now unsatisfied, of more than four thousand dollars, with no assets to pay them, it cannot be supposed that so great a loss, being a difference of between six and seven thousand dollars, could arise in the course of the partnership business in the short period of two years; and therefore it is said it must be presumed that property is wrongfully withheld.

Upon this it may be observed in the first place, that concealment of property involves not only a charge of gross fraud, but also the crime of false swearing; and such being the nature of the charge, it ought to be substantiated either by direct testimony, or by such facts as afford unequivocal circumstantial evidence of it. It certainly ought not to be taken as true upon any slight or ambiguous presumptions, nor upon any state of facts which do not clearly, and indeed almost necessarily, call for such an inference. Now, there are many ways in which the supposed loss may be accounted for without imputing actual fraud to the bankrupt; such as by an over estimate of the property at the time of taking the inventory — by debts turning out to be bad which were then supposed to be good — or by the general depreciation which is known to have taken place in the value of property. There is no certainty, nor indeed any high improbability, that such are not the true causes of the loss; but, at any rate, it would be too much to say, in the absence of all proof on the subject, that the loss is to be imputed, not to any such supposable causes as these, but to positive fraud and wilful misconduct on the part of the bankrupt.

But it is to be noticed, that the debts of four thousand dollars still remaining unpaid, are, some of them, secured by mortgages on the property, and the property still stands as security for them; so that the loss is not so great as has been computed. Besides, it is

to be remembered, that in November, 1840, all the property of the partners was attached; and goods and other personal property, estimated at $4,000, were sold on executions in December, 1840, for about $1,500. Here was a sacrifice at once of something like $2,500; and it is not too much to suppose, that in the shifts and turns the partners were obliged to make under the difficulties then pressing upon them, other considerable sacrifices may not also have been incurred.

But looking to the inventory, I should form a different opinion from that expressed by the counsel, as well as from that which seems to have been entertained by those who made the inventory. The inventory represents the joint and separate assets, that is, the partnership and private property, at $13,958, and the liabilities at $11,833, making the partners good for $2,867. But it is to be noticed, that to make out this surplus there was included in the account of assets a debt of $2,668 against the old firm of Walbridge & Pearce, when it is conceded that that firm was insolvent at the time for at least $686. So that really there was no surplus. And my conclusion would be, considering the magnitude of the liabilities, and the nature of the assets, that the partnership and the individuals composing it, were in fact then insolvent. Such, I think, is the fair conclusion, especially when it is considered that the whole surplus made out, consisted of a debt due from two of the partners themselves.

As to the small amount of demands set forth by the bankrupt in his schedule as belonging to the firm, it appears that in the summer of 1840, notes to the amount of $2000 were turned out to pay Henry Gassett & Co. and certain other creditors; and that in November of the same year, all the partnership accounts were assigned to Hicks & Dwinnell, to pay, first, certain debts due them and certain liabilities they then incurred as sureties; then to pay certain other creditors particularly named; and the residue, if any, to pay creditors residing in the county of Washington. This, it is to be observed, was an absolute assignment in trust to pay creditors, leaving no residuum whatever in the bankrupt and his partners; and Dwinnell testifies that enough has not been collected out of the accounts to pay even the preferred creditors particularly named. It also appears, that in November 1840, notes to the amount of $325 were assigned to Israel Dwinnell and Stephen Pearce, and notes to the amount of $350 to Shubael Wheeler, to pay or secure them for signing notes of an equal amount; and the balance, if any, in the hands of Wheeler, as well as the balance, if any, in the hands of Asa Alden, to whom it seems, there had been

a previous assignment of notes, was, on the 5th of August 1841, assigned to Asahel Pearce to pay a debt due him from the firm, of $334. These assignments, all of which except the two first are set forth in the bankrupt's schedule, go far to account for the demands of the firm, and to show how they have been disposed of.

As to the demands of the old firm of Walbridge & Pearce, the bankrupt says, he did not insert them in his schedule, because most of them were outlawed, and he considered them of no value. Now I do not see how it can be said that a bankrupt is guilty of fraud, or of a wilful concealment of property, by omitting to specify in his schedule a mass of obsolete and worthless demands, upon which no action whatever can be maintained. The omission cannot be supposed to proceed from any fraudulent intent, or from any wilful design to conceal property, especially in this case, when it appears that these demands were afterwards delivered over to the assignee under the bankruptcy.

As to the goods in the store claimed by Dwinnell & Pearce, and the notes claimed as being assigned to them for goods taken by the bankrupt out of the store, the question depends upon the fact, whether the goods and notes belonged to Dwinnell & Pearce, or were in truth the property of the bankrupt. If they were not the property of the bankrupt, he was not bound to state them in his schedule, and indeed could not properly do so. The question, as I have said, is a question of fact, and must be decided upon the testimony taken in the case.

Now Dwinnell & Pearce testify, that they purchased of the goods sold on execution in December 1840 to the amount of seven hundred dollars; that they afterwards purchased about five hundred dollars worth of new goods; that they put all the goods into the store, and employed the bankrupt as their agent to sell them. They also say, that they gave public notice, by advertising in the public papers, that they had opened a store and that the bankrupt was their agent to transact the business. They further say, that the bankrupt had no interest whatever in the goods, but had liberty to dispose of goods to purchase in the company debts on condition of turning out good notes or other property to pay the amount; and that he took out of the store in the course of the year goods to the amount of five hundred dollars, and in February 1842, delivered them a written list of notes amounting to seven hundred dollars in payment; a copy of which list is annexed to the testimony. They also say, that the notes were delivered into their possession in February, but were afterwards left at the store, in the care of the bankrupt, to collect or secure for them. Some, they say, they

collected and secured themselves; and some, they say, never can be collected.

Such is the testimony of the witnesses on the part of the opposing creditors; and as the creditors cannot be allowed to discredit their own testimony, it must have its full weight in favor of the bankrupt. The effect of the testimony, as it appears to me, is to prove the goods to be in fact the property of Dwinnell & Pearce, and to make out a transfer of the notes to them before the filing of the bankrupt's petition; and of course he could not claim either the goods or the notes as his property in his schedule. There is, then, on fairly weighing the testimony, no evidence to support the objection of a wilful concealment of property.

2. The next inquiry is, under the second head of objections, whether the bankrupt has given preferences to particular creditors, so as to preclude him from a discharge. And here it may be observed, that it is unnecessary to go into any of the transactions which took place before the passing of the Bankrupt Act, because there is no evidence to warrant the conclusion, that any of the payments or transfers made before that time were made in contemplation of the passing of the law. The inquiry will of course be confined to transactions which took place since the passing of the law, and to such transactions only as have been specified and relied upon as preferences, and concerning which some proof has been given.

All the transactions of this character, except one, appear to be quite free from difficulty. The payments to Town, Pearce, and Rich, rest solely and entirely upon the testimony of the bankrupt himself, whom the creditors have chosen to examine for the purpose of proving the payments. He says, that each of these payments was made on application and demand of the creditor; and that being the case, and the payments not appearing to be out of the ordinary course of business, they cannot, in my opinion, under the circumstances stated in regard to them, be treated as fraudulent preferences.

But the payment or transfer to Dwinnell & Pearce is presented by the proofs in a different aspect; and I confess, that with every disposition to view the transaction in the most liberal and favorable light, I have not been able to overcome the difficulties which attend it. It is evident enough that the bankrupt and his partners, at the time this transfer was made, were irretrievably insolvent. About this there can be no question. It is also the fair inference, from the testimony, that the transfer was voluntary on the part of the bankrupt; for it seems that he not only made out and deliver-

ed the list of the notes to Dwinnell & Pearce without request, but that he afterwards sent the notes to them by a messenger without any demand or solicitation on their part.

The question then is, was this transfer a preference within the meaning of the Bankrupt law ? It is difficult, and indeed impossible to reconcile all the decisions to be found in the books applicable to this question. In some cases it is held that a payment by a debtor in insolvent circumstances, *voluntarily made*, is presumptive evidence of a preference; in others, it is held, that you cannot infer a contemplation of bankruptcy from mere insolvency. I think the latter is the sounder and better opinion. I think that a transfer being voluntary and while the debtor is in a state of insolvency, when it is only of a part of his property, and does not appear to be out of the ordinary course of business, is not enough. I think it must appear that the debtor, in making the transfer, though he did it voluntarily and while in fact insolvent, acted *in contemplation of bankruptcy;* that is, in anticipation of breaking or failing in his business, of committing an act of bankruptcy, or of being declared bankrupt at his own instance on the ground of inability to pay his debts, and intending to defeat the general distribution of effects which takes place under a proceeding in bankruptcy. A man may be insolvent, and yet go on with his business with the real hope of retrieving his affairs, and with a *bona fide* intention and expectation of saving himself from breaking or failing, and of being able to pay his debts; and a payment or transfer under such circumstances, though voluntary, would not be a preference within the meaning of the law.

But in the present case, there was something more than mere insolvency. The bankrupt and his partners were not only hopelessly insolvent at the time of the transfer, but they had actually failed and stopped business. Their failure was complete and notorious sometime before. Dwinnell, Pearce, and the bankrupt himself, in their testimony, all speak of the failure as having been complete and irretrievable. And in that condition of absolute insolvency and known actual failure, what does the bankrupt do ? Why, instead of effecting a compromise with his creditors upon equal terms as to all, he voluntarily pays certain creditors in full, leaving a large mass of other creditors wholly unpaid. He transfers to Dwinnell & Pearce, without any demand or request on their part, notes to the amount of seven hundred dollars to pay a debt of five hundred, and does not so much as notice or set up any claim against them for his full year's services as their agent. And he does this while under the apprehension and just on the eve of

being committed to jail upon an execution in favor of one of his creditors, from which, it seems, he was afterwards discharged on taking the poor debtor's oath. He thus strips himself, at once, of all his remaining property, except a mere trifle, and in about two months after, whether more or less does not distinctly appear, he files his petition in bankruptcy.

If a transfer of property of such an amount, under such circumstances, followed up, as this was, in a short time after, with a proceeding in bankruptcy instituted by the bankrupt himself, is not held to be a preference given in contemplation of bankruptcy, with intent to defeat the equality among creditors secured by the bankrupt law, I do not see but that the main object of the law might be defeated in every case of voluntary bankruptcy whatever, since the party in every such case is at liberty to choose his own time and apply for the benefit of the law whensoever he pleases.

It does not appear to me that the question is in any way affected by what is stated to have been the agreement or understanding with Dwinnell and Pearce. They say that the bankrupt had liberty to take up goods from the store on his own account, on the condition of turning out good notes or other property to pay for them; that is, any good notes or other property. There was no specific appropriation by the agreement of these particular notes to pay for the goods, but the agreement was general. Under it, the bankrupt became a debtor to Dwinnell and Pearce for what goods he took up and charged himself with from time to time, with the right to pay in any good notes or other property; and Dwinnell and Pearce became his creditors, having a debt against him with the same rights as other creditors.

Upon the whole, I do not see how this payment or transfer can be regarded in any other light than as an unlawful preference within the sense and intent of the bankrupt law. The general character of the bankrupt, as well as his deeply embarrassed condition, would render it more desirable as well as agreeable, to have been able to come to a different conclusion. But we must take the law as we find it; and as Lord Ellenborough said in another case, whatever may be the personal wishes or feelings of the court, it is not at liberty to disregard established principles, or sanction any transaction which a just construction of the law forbids. The consequence is, that a certificate of discharge must be refused.

Supreme Judicial Court, Maine, June, 1843, at Bangor.

HENRY WARREN *v.* ISAAC WHEELER.

The assignee of a bond may maintain assumpsit upon an agreement indorsed thereon, by which the obligor promises performance to the assignee, though the agreement is without a new consideration, and is not under seal.

An acknowledgment, in such indorsed agreement, that conditions precedent on the part of the plaintiff have been performed, dispenses with the necessity of proving such performance.

Where the obligor agreed "to deliver a deed within thirty days, and *then* said assignee shall deliver me the notes mentioned," and the obligor did not deliver the deed, or offer to do so; *held*, that it was a breach of the contract, though the assignee did not deliver or tender the notes.

Testimony respecting the value of neighboring lands is admissible, in determining the value of a piece of land, unless proved to be of different quality, or situated in a densely settled part of a village or city; but it would be merely circumstantial evidence.

ASSUMPSIT upon an agreement in writing, signed by the defendant, on the back of a bond, executed by the defendant to one Kimball, and assigned by Kimball to the plaintiff. The bond was in the penalty of six thousand dollars, and the condition was, that whereas the defendant had contracted with the said Kimball, to sell and convey to him, or his assigns, a certain tract of land in Bangor, being the same tract purchased by the defendant of John M. Prince, containing three acres, more or less, at the rate of $1000 per acre, to be paid one third cash upon delivery of the deed, and the remainder, half in one year, and half in two years, with interest annually; the purchaser to give good notes for the second and third payments, with satisfactory security, — now, if the said Kimball or his assigns should elect to become purchasers on the above conditions within sixty days from date, the said Wheeler should thereupon execute and deliver, upon request, a good and sufficient deed of the premises. The bond was dated June 11, 1835, and was assigned by Kimball to the plaintiff, as appeared by two assignments on the back of it, by one of which, dated June 11, 1835, Kimball, in consideration of $15, assigned one half of the bond to the plaintiff, and by the other, dated July 9, 1835, he assigned to the plaintiff, in consideration of $750, all his right and interest therein, and authorized him to use his name to carry it into effect.

The instrument on which the action was brought was in these words: "I acknowledge notice to have been given on the within in due time, and demand of deed, and also have received one

thousand dollars, the first payment, according to the tenor of this bond. And I have agreed to deliver to Henry Warren (assignee) or his assignees, a good warrantee deed, within twenty days from date, and then said Warren or assignee shall deliver to me the notes mentioned within. And if the said Warren shall have had said land surveyed in the mean time, and it shall fall short of three acres, then I am to discount in proportion.

August 27th, 1835.

(Signed) ISAAC WHEELER.

Witness Jedidiah Kimball.

The plaintiff offered to prove by Kimball that the plaintiff gave him $15 for the first assignment, and $750 for the second. This evidence was objected to by the defendant, but was admitted. Kimball further testified that he demanded of the defendant, for the plaintiff, a deed of the land mentioned in the bond, at the defendant's house in Garland, in the last of June, 1835. The defendant said he could not attend to it then, but would do so before the bond ran out. In the middle or last of July, the witness called upon the defendant again, and told him he wished him to come and run out the land, and give a deed. The defendant fixed a time when he would meet the witness in Bangor, and attend to it. The witness came to Bangor at the time appointed. The defendant came a day or two after, and said he could not see to running out the land at that time. This was all the evidence, except the agreement itself, which was offered by the plaintiff, to show a performance of the conditions on his part.

The plaintiff then offered the record of a mortgage, executed by the defendant to one Prince, of the land described in the bond. This was objected to by the defendant, but was admitted. The mortgage was dated March 5, 1833, and discharged on the margin of the record December 23, 1835.

Upon the foregoing evidence, the defendant moved for a nonsuit; but Tenney J., before whom the case was tried, for the purpose of giving progress to the trial, overruled the motion, on the agreement of the plaintiff to become nonsuit, if he was not entitled to maintain his action.

Witnesses were introduced by the plaintiff to prove the value of the land, and to prove what land, lying in the neighborhood of the land described in the bond, was sold for in the fall of 1835, and also in Bangor, more remote. The plaintiff also offered evidence, to show for what sum, in the opinion of the witnesses, lots in the land in question might have sold for in September, 1835, and also, what, in their opinion, the whole lot might have brought per acre,

based upon the price at which lands in Bangor were selling in the market, in the fall of 1835. All of this evidence was objected to by the defendant, but admitted by the court.

Several witnesses for the defendant were introduced, who testified as to the value of lands in Bangor, and as to the actual value of the land in question in 1835, and its diminished value in October, 1838, at which time the action was brought.

The Judge instructed the jury that the plaintiff could maintain this action in his own name; that the covenants and agreements, in the writing declared on, were independent, and that no tender of notes was necessary to be made by the plaintiff, further than what appeared by the writing declared on, and the evidence touching that point; that it was the duty of the defendant to tender a deed within the twenty days; that, in assessing damages, they should find the value of the land on September 15, 1835, in money; that in coming to a result, they would not be confined to the value of the land for agricultural, or pastoral, or other useful purposes, or on account of the probability that the land would be in demand for building lots; but they might take into consideration the marketable value, also, at the time, and arrive at the result from taking a view of all the objects for which the land was desirable; and that their verdict on this question would be for what they considered the value of the land, estimated by the foregoing principles, on the 15th of September, 1835, deducting therefrom the sum of $2000, which had not been paid, and adding interest on the balance so found from the said September 15, 1835.

The jury returned a verdict for the plaintiff, for $2,419 81, being the amount of $1,765, and interest thereon.

If the action could not be maintained upon the evidence adduced, the verdict was to be set aside, and a nonsuit entered. If the action could be sustained, and any of the objections overruled should be held valid, or if the rules given for assessing the damages are incorrect, the verdict was to be set aside, and a new trial granted; otherwise, judgment to be rendered upon the verdict.

Kent for the plaintiff.
A. W. Paine for the defendant.

Shepley J. The first objection is to the form of the action. In the case *Fenner* v. *Means*, (2 Bl. R. 1269,) the defendant made a bond to one Cox, and indorsed upon it an agreement to pay any assignee of Cox; the plaintiff being such assignee, maintained assumpsit on that agreement. That case has been approved in many subsequent cases. It is then said the promise to plaintiff is not

binding for want of consideration and mutuality. In the case of *Innes* v. *Wallace*, (8 T. R. 595) the court say they were clearly of opinion that the assignment of the bond to the plaintiff was a good consideration for the assumpsit of defendant; and it was so decided in *Crocker* v. *Whiting*, (10 Mass. 319,) and *Parkhust* v. *Dickinson*, (21 Peck, 310.) The case of *Froth* v. *Stanton*, with the notes appended, (1 Sand. 210) is not opposed to this doctrine. The decision in that case is that there must be a new consideration to support the promise by an executrix to pay *de bonis propriis*.

The second objection is, that "the plaintiff should have given defendant notice of his desire to purchase, that he might have an opportunity to provide the deed." No doubt such was the duty required by the bond; but the defendant, in his written agreement, indorsed upon the bond, says, "I hereby acknowledge notice to have been given on the within in due time and demand of a deed." There was no occasion for further notice or demand, for the defendant had acknowledged that these preliminary steps had been taken, and that the cash payment had been made, and had thereupon agreed to deliver a deed within twenty days.

The third objection is, that the covenants in the bond, and the stipulations in the agreement indorsed upon it, were dependent, and that the plaintiff should therefore have made and tendered the notes before he could call upon the defendant to perform. There can be no doubt that it was the intention of the parties, as expressed both in the condition of the bond and in the agreement indorsed upon it, that the deed should be delivered and payment made by money and notes at the same time. And neither party would be obliged to perform unless the other party did. In such cases the general rule is, that the party who would claim performance from the other must show a readiness and offer to perform on his part; but this rule does not prevail when the contract itself determines which party shall first prepare and offer to perform. When the parties have agreed upon this matter, neither the law nor the tribunals break in upon or disregard such agreement. They are admitted to be effectual. Have the parties in this case agreed which should first prepare and offer to perform? The defendant, in the agreement indorsed upon the bond as before stated, acknowledges notice of the acceptance of the terms of purchase, a demand for a deed, and the receipt of the cash payment of $1000, and then says, "I hereby agree to deliver Henry Warren, assignee, or his assigns, a good warrantee deed, within twenty days from date, and then said Warren or assignee shall deliver to me the notes mentioned within." The intention and effect of this language cannot be mis-

understood. The defendant acknowledges that the previous acts required of the other party have been so far completed, that it became his duty to prepare and present a deed and then receive the notes on its delivery, and this he promised to do within a certain time. And this he has never done or offered to do. And it is as clearly a breach of his contract, as if he had promised in writing to pay the debt of another within a certain number of days, and then receive an assignment of the debt to himself, and had wholly neglected it.

Other objections have reference to the admission of testimony relating to the value of the land, and to the instructions respecting the measure of damages. It might not be a very unreasonable inference that the value of three acres of land would not vary greatly from that "lying in the neighborhood," or that in the same place "more remote," unless it should be proved to be of different quality, or to be situated in the densely settled part of a village or city, and it does not appear that this was so situated, or that testimony was received of the value of the lands at any great distance from it. It would be circumstantial evidence only of the value of the three acres, and as such it might be received.

The instructions to the jury respecting the measure of damages, as well as upon the other points in the case, appear to have been correct. Judgment on the verdict.

District Court of the United States, Massachusetts, September, 1843, *at Boston. In Bankruptcy.*

IN THE MATTER OF GEORGE WILSON.

THIS was the case of a petition by a bankrupt for his discharge, a majority of his creditors having objected thereto, the bankrupt obtained a trial by jury. The objections filed by the creditors were: 1. That the bankrupt had been guilty of fraud and of wilful concealment of his property and rights of property contrary to the provisions of the law. 2. That he had preferred some of his creditors contrary to the provisions of said act. 3. Because he wilfully omitted and refused to conform to the requisitions of said act. 4. Because he had admitted false or fictitious debts against his estate. The principal ground relied on by the creditors, was, that in March, 1842, all the stock of the bankrupt, except groceries and furniture, were attached by the Kinderhook Bank, when a receipt was given on a valuation of $900, and the suit is now pending. The receiptor took the property, and the bankrupt took no notice of it in the schedule annexed to his original petition. There was considerable testimony upon this and other points, the bankrupt taking the ground that he acted under a mistake as to his duty in this particular.

Fiske for the creditors. *Gray* for the bankrupt.

SPRAGUE J. in his charge instructed the jury, that they must be satisfied that the bankrupt *wilfully* concealed his property. If he acted in good faith, but under a mistake, his discharge ought not to be withheld.

The jury returned a verdict in favor of the bankrupt.

Digest of American Cases.

Selections from 17 Peters's (U. S.) Reports.

APPEAL AND WRIT OF ERROR.

An appeal or writ of error will not lie from the decision of the Circuit Court to the Supreme Court, in a case of bankruptcy adjourned from the District Court. The decision of the Circuit Court is conclusive on the district judge. *Nelson* v. *Carland*, 181.

2. Where matters of defence were not brought forward on the trial in the Circuit Court, and were insisted upon in the argument before the Supreme Court for the consideration of the Court, by the counsel for the defendant, the Court said: To all questions raised here on which the Court below were not called to express an opinion, this Court does not consider themselves at liberty to express any opinion. *Bell et al.* v. *Bruen*, 161.

3. A complainant, after having appealed from a decree in his favor, cannot be permitted pending the appeal, to carry into execution the decree which he is seeking to reverse in the appellate Court in order to obtain a decree for a larger sum. *Taylor and others* v. *Savage's Executors*, 229.

4. The executor had been removed by the order of the Orphan's Court: on the same day a decree was rendered against him in the District Court of the United States for the northern district of Alabama. He appealed to the Supreme Court, not knowing of his removal, but did not enter into the required appeal bond. The administrator cum testamento annexo, appointed by the Orphan's Court applied by petition to the Supreme Court for liberty to enter the appeal and give bond, &c. By the Court: The relief asked by the petition cannot be granted, because there is no case legally in this Court, upon the appeal of either party, on which process can be issued. Before the appeal was prayed on either side, S. had ceased to be the representative of S., deceased. By his removal from the office of executor, he had no right to appear in or be a party in this or any Court, in a suit which at law is confided to the representative of the deceased. No further proceedings could be had in the District Court until the administrator de bonis non shall be made a party. *Ib.*

APPROPRIATION OF PAYMENTS BY THE DEBTOR OR CREDITOR.

The rule established by this Court, as to the appropriation of payments by debtor or creditor, in the case of the United States *v.* January and Patterson, 7 Cranch, 572, is the true one. In that case the Court say: "The debtor has the option, if he think fit to exercise it, and may direct the application of any particular payment, at the time of making it. If he neglects to make the application, the creditor may make it: if he also neglects to apply the payment, the law will make the application." *The United States* v. *Eckford's Executors*, 251.

ASSIGNMENT, AND ASSIGNEE.

A debtor made an assignment in 1813, conditioned that he would pay his debts before April 1, 1818, and in the mean time he was to hold the real estate, and take the rents and profits of the same, without account. If, within that time the debts were not paid, the assignee, on the application of any unpaid creditor, might sell the estate. In 1837, the assignee filed a bill on the equity side of the Circuit Court of the county of Washington, asserting that some of the debts were unpaid, and asked the aid of the Court to make sale

of the real estate which had been assigned. The Supreme Court reversed the decree of the Circuit Court, which had made a decree for the sale of the real estate. *McKnight* v. *Taylor*, 197.

ASSUMPSIT FOR USE AND OCCUPATION OF LANDS.

The remedy by action of assumpsit for the use and occupation of lands and houses, existed in Virginia before the cession of the District of Columbia to the United States. This remedy was declared by the Supreme Court of Virginia to have always been a part of the jurisprudence of that state, and has been recognised by her legislation; not as a remedy created by statute, but as one enlarged and favored, by making it a transitory, instead of a local action. *Lloyd* v. *Hough*, 137.

2. Wherever the action of assumpsit for use and occupation has been allowed, it has been founded, and would seem necessarily to be founded upon contract, either express or implied. The very term assumpsit presupposes a contract. Whatever excludes all idea of a contract, excludes at the same time a remedy which can spring from contract only, which affirms it, and seeks its enforcement. *Ib.*

3. To maintain the action for use and occupation, there must be established the relation between landlord and tenant, a holding by the defendant under a knowledge of the plaintiff's claim or title, and under circumstances which amount to an acknowledgment of, or acquiescence in such claim or title, and an agreement of permission on the part of the plaintiff. The action will not lie where possession has been acquired or maintained under a different, or adverse title; or where it was tortious, and makes the holder a trespasser. *Ib.*

BANKER, AND BANK.

Whenever a banker has advanced money to another, he has a lien on all the paper securities which are in his hands for the amount of his general balance, unless such securities were delivered to him under a particular agreement. *The Bank of the Metropolis* v. *The New England Bank*, 174.

CERTIFICATE OF DIVISION OF OPINION BETWEEN THE JUDGES OF THE CIRCUIT COURT.

In the case of Nelson, a petitioner in bankruptcy in the Kentucky district, against Carland, an opposing creditor, several points were adjourned by the District to the Circuit Court. Upon the hearing of the case in the Circuit Court, the district judge, as well as the justice of the Supreme Court, sat in the case; and being opposed in opinion upon questions adjourned from the District Court, they were certified to the Supreme Court, on the motion of the counsel for the petitioner. Held: that the district judge cannot sit as a member of the Circuit Court, upon questions adjourned to that Court, under the "Act to establish a uniform system of bankruptcy throughout the United States;" consequently, the points adjourned cannot be brought before the Supreme Court, by a certificate of division. *Nelson* v. *Carland*, 181.

CHANCERY.

It is not merely on the presumption of payment, in analogy to the statute of limitations, that a Court of Chancery refuses to lend its aid to stale demands. There must be conscience, good faith, and reasonable diligence, to call into action the powers of the Court. *McKnight* v. *Taylor*, 197.

2. In matters of account, where they are not barred by the act of limitations, Courts of Equity refuse to interfere after a considerable lapse of time, from considerations of public policy, and from the difficulty of doing entire justice where the original transactions have become obscure by time, and the evidence may be lost. *Ib.*

3. A bill was filed in the Circuit Court of the eastern district of Pennsylvania, by Thomas Morris, against Nixon and others, claiming a conveyance of certain real estate in the county of Philadelphia, which the bill alleged had been conveyed by Morris to Nixon, as a security for money loaned by him to Morris, with an offer to repay any balance which might be due to Nixon; and for an account of all moneys received by Nixon and others for sales of parts of the estate, with a prayer for

general relief. The defendants answered the bill separately. Nixon alleged that the conveyance of the estate had been an absolute one, for a full, legal, and sufficient consideration. A bond for the sum paid by Nixon was given by Morris, which Nixon asserted was only to be enforced if the property conveyed should be found of insufficient value; or in the event of insolvency in Morris, it might be used for the benefit of his family. At the time the conveyance was made, asserted to have been absolute and for full consideration, a correspondence was had between Morris and Nixon. The Court held, that from the situation of the parties, the pecuniary embarrassments of Morris at the time of the conveyance, and the evidence furnished by one of the letters of Nixon to Morris, written within two or three days before the conveyance was executed; that the estate was held in trust for Morris by Nixon; and decreed that the executors of Nixon should convey the estate to Morris, all accounts between the parties being previously adjusted, and any balance which might be due to the estate of Nixon being previously paid. *Morris* v. *Nixon et al.*, 109.

4. Courts of Equity will not permit an uncertain benefit, such as was expressed in reference to the bond for five thousand dollars, to weigh at all, in their consideration of cases like this before the Court. If they did, it might become a contrivance to give a plausible covering to an originally meditated fraud, or to one induced by the temptation of gain. *Ib.*

5. Where an answer to a bill in Chancery is not responsive to the bill, but sets up distinct affirmative matter of defence and bar, the defendant must prove the matter set up; or it can have no effect for defence or in bar. *The Bank of the United States et al.* v. *Beverly et al.*, 128.

6. A bill in Chancery had been filed, alleging fraud and trust in the defendant, and had been decided against the complainants. Held, that if the jurisdiction in equity was properly exercised, it concludes all questions of fraud in the case. *Mercer's Lessee* v. *Selden*, 61.

COLLECTOR OF THE REVENUE FOR DUTIES ON GOODS AND MERCHANDISE.

The collector is responsible for all moneys received by him and not accounted for, without reference to the official terms he may have served, or to any bonds he may have executed. But this is not the case with his sureties. They are responsible only for faithful performance of his duties for the term of his appointment. The condition of the bond is, that he hath performed his duties faithfully, and that he shall continue to perform them. But this condition does not extend to his delinquencies under any other appointment. *The United States* v. *Eckford's Executors*, 251.

2. The bond on which suit was brought is dated 22d June, 1830, and relates to the 29th of March preceding, at which time the term of the collector commenced; and its obligation extends to the 29th of March, 1834. That the sureties are not bound beyond that period, is too clear for controversy. As it regards their liability, it is the same as if Swartwout had served only the term covered by their bond. For the faithful performance of his duties under the executive appointment which preceded that term he gave bond and security, and also under the appointment for the four years which he served from the 29th of March, 1834. So far as the sureties are concerned, these terms are as separate and distinct as if a different individual had filled each of them. *Ib.*

3. At the commencement of each term, an amount is charged against the collector, but it may be composed of bonds in suit, not due, and deposited specially. The balance charged, therefore, at the commencement of any quarter or term, does not show that the collector is in default. He may indeed stand charged with money actually paid into the Treasury by him, but for which he has received no credit, or what is called a "covering warrant" has not been issued. Until this has been done, the credit cannot, by the usages of the Department, be given. *Ib.*

4. The retrospective obligation of a bond with surety given by a collector, is as much limited by the term of the

new appointment as the prospective. The obligation is limited to the term of office fixed by law. *Ib.*

5. The Treasury officers are the agents of the law. It regulates their duties as it does the duties and the rights of the collector and his sureties. The officers of the Treasury cannot, by any exercise of their discretion, enlarge or restrict the obligation of the collector's bond. Much less can they, by the mere fact of keeping an account current, in which debts and credits are entered, and without any express appropriation of payments, affect the rights of the sureties. The collector is a mere agent or trustee of the government. He holds the money he receives in trust, and is bound to pay it over to the government as the law requires; and in the faithful performance of this trust the sureties have a direct interest, and their rights cannot be disregarded. *Ib.*

6. The Treasury officers cannot say that the funds currently received and paid over shall be appropriated in the discharge of a defalcation which occurred long before the sureties were bound for the collector. If the collector be in default for a preceding term, it is the duty of the Treasury Department to require payment from him and his sureties for that term. To pay such defalcation out of accruing receipts during a subsequent term, even with the assent of the collector, would be a fraud upon the sureties for such term. *Ib.*

7. The government must show the amount of the defalcation of the collector during the term for which the defendants were sureties, to charge them; and this is not done on the face of a general transcript of the accounts of a collector during more than one term. It is therefore necessary to have a restatement of the account for the purpose. *Ib.*

8. The amount charged to the collector at the commencement of the term is only prima facie evidence against the sureties. If these can show, by circumstances, or otherwise, that the balance charged in whole or in part by the collector has been misapplied by the collector prior to the new appointment, they are not liable for the sum so misapplied. *Ib.*

9. In answer to the question, "whether the payments made by the collector subsequently to the 28th of March, 1834, should be appropriated in discharge of his indebtment on that day," the Court say; That so far as such payments were made of moneys accruing and received in the subsequent term, they should not be so applied. But so far as the payments were made in the subsequent term of moneys received on duty-bonds or otherwise, which remained charged to the collector as of the preceding special term, such payments should be appropriated to the discharge of the indebtment of the collector for that term. *Ib.*

COMMERCIAL LAW.

In the port of Liverpool, a collision took place between two American ships, both laden with cargoes, and ready to sail for the United States: one of the ships was much injured, was obliged to re-land her cargo, which was much damaged, and to undergo considerable repairs. The vessel which did the injury had a pilot on board, and was coming out of dock. The owner of the vessel which had done the damage, claimed, that, by the statutes of Great Britain, he was not responsible for any damage occasioned by the fault, negligence, or unskilfulness of the pilot. The Court held, that the collision having taken place in the port of Liverpool, the rights of the parties depend upon the provisions of the British statutes, then in force; and if doubts exist as to their true construction, the construction adopted by the British Courts must be adopted in this Court. *Smith et al.* v. *Condry*, 20.

2. The decision of the Courts of England establish that the master and owner of a vessel, in the port of Liverpool, having a pilot on board, in cases when by the statutes a pilot is required to be on board, are not answerable for any loss or damage by collision; nor are they prevented from recovering on any contract of insurance by reason of any default or neglect on the part of the pilot. *Ib.*

3. The plaintiffs in the Circuit Court claimed damages for the loss of a market of the cargo, by reason of the detention of their vessel for repair at the port of Liverpool. They asserted a

right to value the cargo at what it would have brought had it arrived in due season at the port to which the vessel was destined, when she sustained the injuries by the collision. The Court said, it has been repeatedly decided in cases of insurance, that the insured cannot recover for the loss of probable profits at the port of destination; and that the value of the goods at the place of shipment is the measure of compensation. There can be no good reason for establishing a different rule in cases of loss by collision. It is the actual damage sustained by the party, at the time and place of the injury, that is the measure of damages. *Ib.*

CONSTITUTIONAL LAW.

The legislature of Illinois, on the 27th of February, 1841, passed an act which directed the appraisement of real estate taken in execution, and if the property should not bring at the offer for sale, two-thirds of the amount of the appraisement, it should not be sold. The law also provided that all property mortgaged should be sold according to the provisions of the act, and that the law should extend to all judgments rendered prior to May 1, 1841. On the 19th of June, 1841, the Circuit Court of the United States for the District of Illinois, adopted a rule, by which property taken in execution under process from that Court, should be appraised according to the law of Illinois, of February 27, 1841, if the case came within the law. The Court, by rule, adopted the section of the act which regulates the sale of property mortgaged, except where special directions should be given in the decree of sale. A mortgagee having obtained a decree of foreclosure and sale, moved for an execution, without being subject to the rule of Court, or to the provisions of the act of 1841. On this motion the judges of the Circuit Court were divided in opinion, and the division was certified to the Supreme Court. The Court held: The laws of the states regulating the process of its Courts, and prescribing the manner in which it shall be executed, do not bind the Courts of the United States, whose proceedings must be governed by the acts of Congress. By the act of Congress of 1828 on the subject of process used in the Courts of the United States, the process on judgments and the proceedings therein shall be the same as were then used in the Courts of the states respectively; and it authorizes the Courts of the United States, in their discretion, by rules of Court, to alter the final process, so far as to conform the same to any changes which might be adopted by the legislatures of the states respectively. Any acts of the legislature relative to final process passed since 1828 are of no force in the Courts of the United States, unless adopted by rules of Court according to the provisions of the act of Congress: and although such laws may have been so adopted, they are inoperative and of no force, if in conflict with the Constitution of the United States. *Bronson* v. *Kinzie et al.*, 28.

2. The obligation of the contract of mortgage depends upon the laws of Illinois, as they stood at the time the mortgage deed was executed. Those laws, as then existing, created and defined the legal and equitable obligations of the mortgage contract. *Ib.*

3. If the laws of the state passed after the contract of mortgage had done nothing more than change the remedy on such contracts, they would be liable to no constitutional objection. A state may regulate, at its pleasure, the modes of proceeding in its Courts in relation to past contracts as well as future. It may shorten the period of time within which claims may be barred by the statutes of limitations. It may direct that necessary implements of agriculture, or the tools of the mechanic, or articles of necessity in household furniture, shall not, like wearing apparel, be liable to execution on judgments. Regulations of this description have always been considered, in every civilized community, as properly belonging to the remedy to be exercised or not, by every sovereign; according to its own views of policy and humanity. *Ib.*

4. Whatever belongs to the remedy, may be altered according to the will of the state, provided the alteration does not impair the obligation of the contract. But if that effect is produced, it is immaterial whether it is done by acting on the remedy, or directly on the contract itself. In either case, it is prohibited by the Constitution. *Ib.*

5. There is no substantial difference

between a retrospective law declaring a particular class of contracts to be abrogated and void, and one which took away all remedy to enforce them, or encumbered it with conditions which rendered it useless or impracticable to pursue it. *Ib.*

6. The law of Illinois of February 19, 1841, acts not only on the remedy, but directly on the contract itself, and engrafts upon it new conditions injurious and unjust to the mortgagee. The law gives to the mortgagor and to the judgment creditor an equitable estate in the premises, which neither of them would have been entitled to under the original contract; and these new interests are directly and materially in conflict with those which the mortgagee acquired when the mortgage was made. Any such modification of a contract by subsequent legislation, against the consent of one of the parties, unquestionably impairs its obligations, and is prohibited by the Constitution. *Ib.*

7. The act of February 27th, 1841, deprives the party of a preëxisting right to foreclose a mortgage, by a sale of the premises, and imposes upon him conditions which would frequently render any sale impossible. Where, by the law existing at the time of the execution of the mortgage, certain rights to enforce the collection of the debt due by it were given, the existence of a covenant in it, as to the manner of enforcing the mortgage by entry on the premises and their sale by the mortgagee, creates no material difference in the right of the mortgagee. As the law of Illinois invaded the right secured by the covenant, there can be no sound reason for a different conclusion, where similar rights are incorporated by the law into the contract, and form part of it at the time it is made. *Ib.*

8. Mortgages made in Illinois since the passage of the law of February, 1841, must undoubtedly be governed by it; for every state has the power to prescribe the legal and equitable obligations of a contract to be made and executed within its jurisdiction. It may exempt any property it thinks proper from sale for the payment of a debt; and may impose such conditions and restrictions upon the creditors as its judgment and policy may dictate. All future contracts would be subject to such provisions; and they would be obligatory upon the parties in the Courts of the United States, as well as in those of the states. This is said in reference to contracts made and to be executed in the state. *Ib.*

CONSTRUCTION.

The general rule is well settled in controversies arising on the construction of bonds, with conditions for the performance of duties preceded by recitals, that where the undertaking is general, it shall be restrained, and its obligatory force limited within the recitals. *Bell* v. *Bruen*, 161.

DAMAGES.

The measure of damages in case of injury to a vessel with a cargo on board, by collision with another vessel, is not the loss of the profit on the goods injured by the collision, at the place to which the vessel was destined when the damage was done; but the value of the goods at the place of shipment must be the measure of compensation. *Smith et al.* v. *Condry*, 20.

DECISIONS OF A COURT OF COMPETENT JURISDICTION.

In Hopkins *v.* Lee, the Court state the settled law of all Courts to be, that, as a general rule, a fact which has been directly tried and decided by a Court of competent jurisdiction, cannot be contested again between the same parties, in the same or any other Court. Hence, a verdict and judgment of a Court of record, or a decree in Chancery, although not binding on strangers, puts an end to all further controversy concerning the points thus decided, between the parties to such suit. In this, there ought to be no difference between a verdict and judgment in a Court of common law, and a decree of a Court of Chancery. *Bank of the United States et al.* v. *Beverly et al.*, 127.

ERROR.

The Court will not, on motion, dismiss a writ of error on the ground that the proceedings in the case from the Circuit Court are not so set out on the transcript of the record as to enable the Court to decide on any question in the case. The plaintiff in error is entitled to be heard, in order that he may show,

if he can, that the error of which he complains is in the record; and, whether it does so appear or not, is a matter which cannot be inquired into, in the form of a motion to dismiss a writ of error. *Minor* v. *Tillotson*, 243.

ESCAPE.

A debt was recovered by a citizen of the state of Ohio, in the Circuit Court of Pennsylvania, and the defendant was arrested by a capias ad satisfaciendum issued on the judgment, and, after his arrest by the marshal, was delivered into the custody of the sheriff of York county, and by him was imprisoned. He applied to an associate judge of the Court of Common Pleas of the county, and gave a bond with security to take the benefit of the insolvent laws of Pennsylvania. The sheriff discharged him from prison. Held, That the sheriff was liable to the plaintiff in the execution for an escape. *Duncan* v. *Darst et al.*, 204. [See 2 Law Reporter, 246, 357.]

EVIDENCE.

Plats of surveys made by the surveyor-general of Florida, while Florida was part of the dominions of Spain, were offered in evidence by the claimant of land, in the Superior Court of East Florida, and were read without objection by the district attorney of the United States. Held, that an objection to them as evidence cannot prevail in the Supreme Court, on an appeal. *The United States* v. *Acosta*, 16.

2. The separate answer of one of the co-defendants, in a proceeding in Chancery, was relied on in the argument for the defendant, to show the nature of the transaction between the parties in 1822, when the deed was executed by Morris to Nixon. The Court took notice of the matters stated in the answer, but considered that, even if the answer was evidence in the cause of the matters stated in it, they would have no influence on the opinion the Court had adopted in the case. No decision was given whether the answer was, or was not, evidence for the defendant. *Morris* v. *Nixon et al.*, 109.

3. The question before the jury was, whether the father of one of the plaintiffs in the ejectment had been married to her mother. Evidence of the declarations of the husband of the plaintiff, he being dead, that the father and mother of his wife had not been married, is legal. *Jewell's Lessee* v. *Jewell*, 213.

4. A separation had taken place between parties alleged to have been married. Articles of separation were executed by the parties. A notice by one of the parties to the articles of separation, that he would pay no debts contracted by the person from whom he had separated, which was inserted in the Charleston Courier soon after the date of the separation, was proper evidence to go to the jury. *Ib.*

5. On a question of marriage, evidence that the persons lived together for many years as man and wife, and treated and spoke of each other as such, is certainly admissible to show that a marriage had taken place between them at some time or other; and whether before or after the date of an agreement to live in concubinage, could not be material. *Ib.*

6. At the Treasury Department a general account had been kept with a collector of the customs, from the time of his appointment, during which different bonds had been given to the United States for each term of office. Afterwards a statement of the account of the collector for one term of office was made out, and a transcript of this account was offered in evidence. The evidence was legal. *The United States* v. *Eckford's Executors*, 251.

EXECUTION.

After the complainant in a bill in Chancery filed in the District Court of Alabama against an executor, had entered an appeal to the Supreme Court from a decree which had been rendered in his favor, the defendant having also appealed from the decree, but had not given bond to prosecute the appeal, the complainant issued an execution on the decree of the District Court, and took the property of the defendant's testator in execution. The Court held that the execution was unauthorized, and no right of property will pass by a sale under it. *Taylor et al.* v. *Savage's Executors*, 224.

FLORIDA LAND CLAIMS.

A claim for eight thousand acres of

land in East Florida, founded on a petition of Domingo Acosta to Governor Coppinger, made on the 20th of May, 1816. The petition stated that services had been performed by the claimant for the defence, support, and advancement of the town of Fernandina, which had never been rewarded. Governor Coppinger gave a decree in favor of the petitioner — "it being the will of the sovereign that the merits of his subjects should be rewarded." The originals of the petition and decree were not produced, they having been lost; but a certificate, signed by Don Thomas Aguilar, the secretary of the government, was exhibited, which stated that the copies of the petition and decree, which were given in evidence, had been faithfully drawn from the originals in his office. Four plats and certificates of survey, made by Clarke, surveyor of the province; two of which surveys were made before the 24th January, 1818, and one on the 14th February, 1818; another on the 20th January, 1920; were given in evidence, without objection, in the Court below, to show the location of the land claimed. The decree of the Superior Court of Florida, in favor of the claimant, was affirmed. *The United States* v. *Acosta*, 16.

2. The official certificates of the secretary of the government of Florida, during the dominion of Spain over the territory, after evidence that no originals could be found in the proper office, was sufficient evidence of the copies of the petition and decree of the governor; no proof having been given to contradict or impair the force of the same. *Ib.*

3. The governor of the territory of Florida, as the deputy of the king of Spain, was the sole judge of the merits on which the claim stated in the petition was founded; and he had undoubted power to reward the merits of the grantee. This has been so decided in many cases. *Ib.*

4. Although, in the governor's decree, there may be no description of any place where the land granted should be located, still it is binding as far as it went. The surveyor-general having been ordered to survey the land solicited, on places vacant, and without injury to third persons, the acts of this officer came in aid of the decree. *Ib.*

5. The surveyor-general having executed the governor's decree before the flags of the United States and Spain were exchanged, all the surveys were valid. That there were several surveys, is no objection to their validity. *Ib.*

6. The plats of the surveys having been read in the Court below, without objection, the proofs authorized the decree. *Ib.*

GUARANTEE.

A letter was addressed by a merchant of New York to merchants in London, in the following terms: "Our mutual friend, Mr. W. H. Thorn, has informed me he has a credit of two thousand pounds given by you in his favor with Messrs. Archias and Company, to give facilities to his business in Marseilles. In expressing my obligations for your friendship to this gentleman, I take occasion to state that you may consider this, as well as any other credit you may open in his favor, as being under my guarantee." The guarantee was accepted by the plaintiffs, and credits were opened by them in favor of Thorn in Cadiz, Gibraltar, Leghorn, Smyrna, Messina, and Trieste, and for drafts on themselves. Thorn became insolvent, largely indebted to the plaintiffs for these credits. The defendant claimed that the guarantee was confined to credits to be opened with the house of Archias and Company at Marseilles; and that no recovery could be had for any payments made by the plaintiffs on credits opened for him at other places than Marseilles, or on themselves. By the Court: — The engagement in the letter of guarantee was made to be executed in England, and must be construed and have effect according to the laws of that country. The law governing the agreement is the same in this country and in England. Had it been made between merchants of different states of this Union, and intended to be executed at home, the same rules of construction would be adopted; and the same adjudications would apply. *Bell* v. *Bruen*, 161.

2. The letter of the defendant was an agreement to pay the debt of another, on his making default. By the statute of frauds, (29 Charles 2,) such agreement must be in writing, and signed

by the party to be charged: it cannot be added to by verbal evidence; nor by written either, if not signed by the guarantor, unless the written evidence is, by a reference in the letter, adopted as a part of it. *Ib.*

3. But, as the statute does not prescribe the form of a binding agreement, it is sufficient if the material parts of it appear either expressed, or clearly to be implied; and correspondence and other evidence may be used to ascertain the true import and application of the agreement, by the aid of which intrinsic evidence, the proper construction may be made. Such is the doctrine of this Court. *Ib.*

4. Where a mercantile guarantee is preceded by a recital definite in its terms, and to which general words obviously refer, the same rule as that which exists in cases of bonds with conditions applies, of limiting the liability within the terms of the recital in restraint of the general words. We find the Courts constantly referring to the cases arising on the construction of bonds with conditions, for the rule of construction; and applying it to commercial guarantees; the most approved text-writers on this subject do the same. *Ib.*

INSTRUCTIONS OF THE COURT TO THE JURY.

It is error in the Circuit Court to instruct the jury, on the prayer of the plaintiff, or on the prayer of the defendant, when either prayer seeks to withdraw from the jury the decision of the fact, and asks the Court to instruct them as to a matter of law, upon the sufficiency or insufficiency of certain evidence offered to prove it. So, also, when the instruction is asked upon a part only of the testimony, leaving out of view various other portions of it, which the jury were bound to consider in forming their verdict. *Smith et al.* v. *Condry*, 20.

INSURANCE.

It has been repeatedly decided in cases of insurance, that the insured cannot recover for the loss of probable profits at the port of destination, and that the value of the goods at the place of shipment is the measure of compensation. *Smith et al.* v. *Condry*, 20.

INTEREST.

It is deemed a well-founded principle, that where a personal demand existed on a real security, and is brought forward at a late day, interest may be allowed, at the discretion of the Court, only from the time of filing the bill in such cases. Under similar circumstances, the rule is equally applicable when mesne profits are claimed. *Buchannon et al.* v. *Upshaw*, 70.

JUDGE OF THE DISTRICT COURT OF THE UNITED STATES.

The district judge of the United States cannot sit as a member of the Circuit Court, upon questions adjourned to that Court under the "Act to establish a uniform system of bankruptcy throughout the United States." *Nelson* v. *Carland*, 181.

JURISDICTION.

An officer is not justified in obeying the order of a judge or Court having no jurisdiction of the matter; and this rule applies in an especial manner as between the State and Federal Courts, where it never has been supposed that the judges of the one could control the process of the other. *Duncan* v. *Darst et al.*, 204.

2. The Courts of the District of Columbia have a like jurisdiction in trespass upon personal property, with the Courts of England, and in the states of the Union; and in the absence of statutory provisions, in the trial of them, they must apply the same common law principles which regulate the mode of bringing such actions, the pleadings, and the proof. *McKenna* v. *Fiske*, 245.

LANDS AND LAND TITLES.

The city of Mobile instituted an action in the Circuit Court of the state of Alabama, for the recovery of a lot of ground in the city of Mobile, in the possession of the defendants, held under a grant from the Spanish Governor of Florida, before the cession of that territory to the United States. The title set up by the city of Mobile was claimed to be derived from the provisions of an act of Congress, passed May 24th, 1824, entitled "An act granting certain lots of ground to the corporation of the city of Mobile, and to certain individuals in said city." The cases of The City of

Mobile *v.* Eslava, 16 Peters, 234, and The City of Mobile *v.* Hallet, 16 Peters, 261, contain all the provisions of this law; and, in the statement of the case, the argument of the counsel and the decision of the Court, reported in that case, are all the matters and the law of this case. The Circuit Court having decided against the title asserted by the plaintiffs, and the judgment of that Court having been affirmed in the Supreme Court of Alabama, the plaintiffs brought the case, by a writ of error, to the Supreme Court of the United States. The Court affirmed the judgment of the Supreme Court of Alabama. The cases of The Mayor and Aldermen of the City of Mobile *v.* Eslava, 16 Peters, 224, and the same plaintiffs *v.* Hallet, 16 Peters, 261, were examined, and the decisions in those cases reaffirmed. *City of Mobile* v. *Emanuel et al.*, 156.

LEGACY.

The executors of General Washington, in the distribution of his estate under his will, assigned a mortgage to legatees, in payment of the distributive share of the estate to which they were entitled under the will. They took an agreement from the assignee of the mortgage that he would pay over to the estate the amount which the mortgage exceeded the distributive share of the estate, to which the legatees were entitled. The property mortgaged was sold to pay the mortgage, and produced a sum far below the amount to which the legatees were entitled. The executors claimed from the legatees the difference between the amount of the distributive share, and the amount of the sum for which the mortgage sold. Held, that the executors were not entitled to the amount claimed. *Hammond's Administrator* v. *The Executor of General George Washington*, 10.

2. Held, that the provision in the agreement between Hammond the legatee, and the executors, cannot be correctly interpreted as binding on Hammond, (however inadequate the mortgage subject might prove to meet his share of the assets,) to carry into the estate, and pay to the executors a sum he never had received; and which, from the nature of things, he could not possibly receive: in other words, to pay the executors his own money. *Ib.*

3. Held, that Hammond on no correct principle can be responsible to the executors for the difference between the proceeds of the mortgage and the amount of the debt due from the mortgagor, which the mortgage was designed to secure. *Ib.*

4. When the testator's intention clearly appears that a legacy shall be paid at all events, the real estate is made liable on a deficiency of personal assets. So when, without any assistance from the will, the nature of the thing to be done may clearly show the intention to charge the real estate with a debt; as where the thing to be done cannot be partially performed without defeating the instruction which directs it. On this principle, the Supreme Court held that the manumission of slaves, pursuant to the direction of a will under the law of Maryland, operates as a specific legacy to the slaves, and to charge the real estate with the payment of the debts of the testator, even though he may have, at the time of his death, no other personal property than the slaves. *The United States et al.* v. *Beverly et al.*, 128.

LIABILITY OF THE REAL ESTATE OF A DECEASED PERSON FOR THE PAYMENT OF HIS DEBTS.

When the testator's intention clearly appears that a legacy shall be paid at all events, the real estate is made liable on a deficiency of personal assets. So where, without any assistance from the will, the nature of the thing to be done may clearly show the intention to charge the real estate with a debt; as where the thing to be done cannot be partially performed without defeating the instruction which directs it. On this principle, the Supreme Court held that the manumission of slaves, pursuant to the direction of a will under the law of Maryland, operates as a specific legacy to the slaves, and to charge the real estate with the payment of the debts of the testator, even though he may, at the time of his death, have no other personal property than the slaves. *The United States et al.* v. *Beverly et al.*, 128.

2. It must be taken as a settled point, that a disposition of his personal property by a testator, to purposes other than the payment of his debts with the

assent of all the creditors, is in itself a charge on the real estate subjecting it to the payment of the debts of the estate, though no such charge is created by the words of the will. A trust is thereby raised which devolves on the executor, who may execute it by his own authority, or be compelled to do it by a bill filed by the creditors, either under the statute of Maryland of 1785, or in virtue of the powers of a Court of Equity in relation to the execution of trusts, as the case may be. *Ib.*

3. Neither lapse of time, nor the statute of limitations can apply to cases where a testator has devised his real estate to be sold for the payment of his debts, or has charged his real estate with the payment of his debts. *Ib.*

LIEN.

The Bank of the Commonwealth of Massachusetts, at Boston, and the Bank of the Metropolis at Washington, were in the custom of sending notes and drafts for collection by the institution located at the place where the notes or drafts were payable. Those notes and drafts, after they had been indorsed by the payers, were made payable to the cashier of the bank where they were payable, by the indorsement of the cashier of the bank by whom they were remitted. The balances due between these banks were at one time in favor of one, and at another time in favor of the other institution. These balances were generally paid by subsequent collections of notes or drafts. The Bank of the Commonwealth failed, indebted to the Bank of the Metropolis. It appeared that certain notes and drafts which were in the hands of the Bank of the Metropolis for collection, at the time of the failure of the Bank of the Commonwealth, were the property of the New England Bank: the cashier of which bank had, after indorsing them, delivered them to the cashier of the Bank of the Commonwealth to be sent to the Bank of the Metropolis. When these drafts or notes were received by the Bank of the Metropolis, no other ownership of the notes or drafts was known to exist but the ownership appearing by the indorsement of the cashier of the Bank of the Commonwealth. Held, that the Bank of the Metropolis had a right to retain out of the notes and drafts when collected a sufficient amount to pay the balance due to the bank, by the Bank of the Commonwealth. *Bank of the Metropolis* v. *The New England Bank*, 174.

2. The possession of the paper was prima facie evidence that it was the property of the Commonwealth Bank; and, without notice to the contrary, the Bank of the Metropolis had a right so to treat it, and was under no obligation to inquire whether it was held as agent or owner; and, if an advance of money had been made to the Commonwealth Bank, the right to retain for that amount could hardly be questioned. The Court do not perceive any difference in principle between an advance of money and a balance suffered to remain upon the faith of the mutual dealings. In the one case, as well as the other, credit is given upon the paper deposited, or expected to be transmitted in the usual course of the transactions between the parties. *Ib.*

3. If the accounts show that it was the practice of the Bank of the Metropolis and the Commonwealth Bank to allow the balances to stand, and await the collection of the paper remitted, the rights of the parties are the same as if there had been a positive, express agreement, and such mutual indulgence on these balances would be a valid consideration: and, like the actual advance of money, give a right to retain the amount due on closing the account. *Ib.*

4. Wherever a banker has advanced money to another, he has a lien on all the paper securities which are in his hands for the amount of his general balance, unless such securities were delivered to him under a particular agreement. *Ib.*

LIMITATION OF ACTIONS.

It is not merely on the presumption of payment, in analogy to the statute of limitations, that a Court of Chancery refuses to lend its aid to stale demands. There must be conscience, good faith, and reasonable diligence, to call into action the powers of the Court. *McKnight* v. *Taylor*, 197.

[Continued in the next number.]

Notices of New Books.

REPORTS OF CASES ARGUED AND ADJUDGED IN THE SUPREME COURT OF THE UNITED STATES — JANUARY TERM, 1843. BY BENJAMIN C. HOWARD. Philadelphia, 1843.

WE had hoped that with a new reporter of the opinions of the Supreme Court of the United States, we should have an improvement, certainly not uncalled for, in the publication of the decisions of that high tribunal. We regret to say, that our expectations have been entirely disappointed. The volume before us is in no sense worthy of the court whose mouthpiece it is. We shall endeavor briefly to point out some of its sins of omission and of commission. In the first place the paucity of the contents of the volume is very striking. There are in all but thirty-five cases, and of these scarcely one can be named of any general interest or importance. We must except however that of *Bronson* v. *Kinzie*, which by partly annulling the appraisement law of Illinois, has gone some way towards uprooting the pernicious doctrine, that the remedy forms no part of the contract, and will have some effect in reviving the clause of the constitution declaring the inviolability of contracts. With this exception the volume is extremely barren. Now, we see no necessity whatever for an annual volume of the decisions of the Supreme Court, unless the intrinsic importance of its judgments renders it desirable. The curse of the bar is the multiplication of reports. The vain ostentation of learning has introduced a preposterous habit of citing the decisions of the multifarious courts of the different states without any reference whatever to their real value, and we daily see the great commercial tribunals of New York seeking for authority on questions of commercial law in the tribunals of perhaps Illinois or Indiana, where the judge, sitting in the midst of prairie, never sees half a dozen bills of exchange in the whole course of his life.

This profitless labor only tends to turn the lawyer from the great authorities in his profession, to make him a case-hunter, instead of a juridical scholar or a philosophical student. Every additional volume of reports is a nuisance, unless it contains some real addition to our stores of knowledge, and we must say that Mr. Howard's volume strongly illustrates this proposition — nothing indeed was ever leaner since the days of Pharaoh's lean kine. Apparently aware of this, the reporter has endeavored to give consequence to his book by sundry additions, which swell the size and augment the expense, while they add extremely little to its value.

The rules, which occupy seventy pages of this volume, have been already published, and the index at the end of all the cases decided in the court, though perhaps convenient, is scarcely worth the paper on which it is printed. The pretext assigned for publishing the rules is, that the volume is small. What sort of a reason is that to give the bar? In the first place, a volume is forced upon the profession that is not needed, and then to give it a decent size, to bestow upon it at least a dropsical appearance of health, it is stuffed and swollen with a mass of matter which in one shape or another we already possess. This is a kind of black-mail levy not at all palatable to us.

But this is the least of which we have to complain. It will scarcely be believed that of the thirty-five cases which the volume contains, six, or rather more than one sixth, are merely *pro forma* decrees, involving no principle, deciding no question, and of no more interest to any human being than a declaration on the money counts.

This will scarcely be realized without turning to one of these important decrees, p. 37.

"Richard W. Alexander, plaintiff in error
v.
Moses Graham, defendent in error.
"In error to the Circuit Court of the United

States, for the District of Columbia, in and for the County of Washington.

"The plaintiff in error filed an order in writing, directing the clerk to dismiss this suit, it is thereupon now here considered ordered and adjudged by this court that this Writ of Error be and the same is hereby dismissed with costs."

Now, one of two things — either this utterly useless matter is crammed into the volume for the purpose of making a book which the profession is to be compelled to buy — or else it is inserted from an excessive and unpardonable indifference to the true objects of a volume of reports. We do not know and do not care which is the real reason. Our only concern is with the honor and interest of the profession, and of that tribunal which is the coping stone of our whole judicial system. We do not desire to see the reports of a court, illustrated by so much learning and virtue, become a byword and laughing stock. It would be abundantly easy to furnish multitudinous proof of this same negligence. In the case of *Morris* v. *Nixon*, p. 118, the points of the appellees are altogether omitted, the more inexcusable an oversight as the judgment was reversed.

In addition to all this, we are favored with the reporter's oath of office — as if the book were a custom house manifest. Why not insert verbatim and literatim the oaths taken by the forty-two attorneys admitted at the January term? And next follows the learned gentleman's card, in which, after making some apology for the extraordinary, incongruous, and ill-digested materials, contained in the volume, the reporter "avails himself of this opportunity to tender his professional services in arguing cases before the Supreme Court. Cases are often brought up from district courts, and from the uncertainty of the time at which they may be called, as well as the small amount in controversy, it is inconvenient or impossible for the counsel who argued them below, to follow them. The daily presence of the reporter in court will ensure his attention to any case that may be confided to him."

We hope the public will understand and remember how and by whom causes of no consequence can be argued gratis — good wine needs no bush.

Thus much for the reports. We have, as we have already said, no other feeling in the matter than to maintain the respectability of our tribunals, and as they are only known through the reports, we cannot but fervently hope that the other volumes of Mr. Howard may differ as much as possible from his first.

In looking over the volume, we have been struck with the great number of reversals. Of the thirty-five cases it contains,

Six are mere *pro forma* decrees, such as the valuable one we have already cited.

Seven are answers to certificates of division, *pro forma* affirmances on equal divisions of the court; dismissals for want of jurisdiction, or denials of motion or petitions.

Of the remaining twenty-two, in which alone the court divided on questions of law, coming up on appeal or writ of error,

Twelve are reversals, and only

Ten are affirmances

Actually the decrees of the circuits have been reversed in a majority of instances. This, unexplained, would argue a most frightful uncertainty in the decisions of the judges at the circuits. But in fact, ten of the cases are from the Circuit Court for the District of Columbia, the judge of which does not sit in the Supreme Court. Of these ten cases, seven judgments of the Circuit Court are reversed, and only three affirmed. Pleasant litigation it must be in the District of Columbia, where, if you get judgment in your favor, it is just two to one that it will be upset in the court above.

Leaving out the District of Columbia decisions, there are but twelve cases, of which five are reversals and seven affirmances. This is a pretty disconsolate state of things, if it represents the general course of decisions in the Supreme Court; if the chances that the circuit judge is right in his ruling are only seven to five, it gives the law a character for vagueness and uncertainty, which exceeds tenfold anything that its most profane libellers have ever said. But the number of cases is so small, that we do not venture to predicate anything of this sort. The facts are too limited to warrant any generalization.

Intelligence and Miscellany.

THE BENCH AND THE BAR. — Our present number contains a long article upon the recent act of the general court of Massachusetts, reducing the salaries of the judges. We make no apology to our distant readers for occupying so much space with a matter, which is apparently of a purely local character; for we believe that a correct view of the principles involved in this discussion is of the highest importance, in a land of equal laws, and a plain exposition of the subject cannot fail to interest the members of a profession, who prize an independent judiciary as the greatest blessing of a free country. Discussions of this sort are the more necessary, as attacks upon the judiciary have become very frequent during the last few years, and they are usually connected in some way with the vulgar prejudices which interested persons endeavor, with too much success, to excite against the whole profession. Indeed, it will be found, that attempts to break down the judiciary, are invariably preceded by assaults upon the bar. The legal profession is the natural and most powerful defender of the bench — the "inner guard" which must be prostrated or bribed before the independence of the judiciary can be successfully attacked. *The bench and the bar must stand or fall together.*

Of late years, it has got to be a regular business of the demagogue to excite a prejudice against a profession, whose honorable character he hates, and whose learning and ability he has good reason to fear; and such persons by falsehood and low cunning, by a pretended regard for the people, and a horror of the evils of litigation, are too successful in keeping our state legislatures in a perpetual excitement upon all subjects connected with the administration of the laws; and ponderous attempts are constantly made to guard against imaginary dangers, which increase the very evils which these law-makers seek to avoid. Thus by cutting down the just and proper fees, and opening the profession to every one who wishes to enter it, whether really qualified or not — in order to cheapen litigation — a high standard of professional excellence is lost, and a class of men come forward, who create the business upon which they live. In some of the states, any man of "good moral character" may practise as a counsellor; and in Maine, a law passed both houses of the legislature, at their last session, erecting *town courts* and providing for trial by a jury (?) of *six*, before justices of the peace. The bill did not receive the approval of the governor; but at the next session it will in all probability become a law. No member of the bar can doubt, that the result will be a fourfold increase of litigation, a large proportion of which will undoubtedly originate with this new class of lawyers, "of good moral character;" but it is just as clear, that the same business in some way or other, at some time or other, will come into the hands of those gentlemen of respectability, who are able to conduct it properly; for unlearned and unskilful lawyers, like quacks in medicine, increase the business of those who are well qualified for their duties.

So far, then, as the pecuniary interests of the bar are concerned, the profession may well suffer these wretched expedients, with which demagogues seek to deceive the people, to be adopted; and such has in reality been the case. But there is another point of view, in which the bar owe it to themselves and to the country, to interpose with zeal, energy, and perseverance. No respectable member of the profession wishes litigation to increase further than seems necessary from the increase of population and of business; but the expedients referred to tend directly to increase litigation of the worst sort — to lower the standard of the profession — to affect the respectability of the bench, and above all, they are always the precursors of direct attacks on the independence of the judiciary. In this view of the case, we repeat it, the bar owe it to themselves and the country, to resist this miserable course of legislation wherever it shows itself.

How shall this be done? The persons who understand this matter the best, and who are the best qualified to meet the emergency, are undoubtedly practical lawyers — the *workingmen* of the profession. Now it unfortunately hap-

pens that this class of men are rarely seen in the halls of the state legislatures — where, if anywhere, the evil is to be remedied. The truth is, they cannot afford the time to engage in an occupation, which gives no adequate remuneration, and which affords a far less desirable opportunity for honorable ambition than the walks of the profession. Of course there are exceptions to this remark, and able practical lawyers are sometimes legislators; but, in general, the lawyers there have made the profession but a stepping-stone to political eminence, and have very little of the proper *esprit du corps*, and less real knowledge of the operation of the laws in their actual details. Sometimes, too, and this it is to be feared, not seldom, they are actuated by a fear of losing political capital, and favor the popular prejudice against the bar, in order to elevate themselves at the expense of their profession, and the actual good of the people. The only remedy seems to be for the real lawyers — those who adopt the profession as a means of an honest and honorable livelihood, to cherish among themselves a proper spirit, and to resist boldly and manfully, without fear or favor, every attempt to encroach on their rights, or to deceive the people — to lay open the tricks of demagogues, and to expose the petty cunning of those of their own number who would sacrifice the rights and interests of the profession to accomplish their own selfish purposes.

We have said, that the bar are the natural and most powerful defenders of the bench, and the latter is never attacked until the former has been to some extent prostrated. It is a matter of regret that some of the judges do not seem to view this matter as it really is; for it is a melancholy thing, in more ways than one, when they look for the popular applause rather than the approbation of those, who are able to appreciate and willing to defend.

In this connection we cannot but remark, with deep regret, that eminent members of the bar do not more generally attend upon the courts while they are in session, especially in the trial of important causes, when the judicial mind is severely tried and needs all the aid which the bar can give. But the truth is, that, in some respects, any "person of moral character" or even of respectable appearance, may now practise in all of our courts, so far as practice consists in taking seats in the bar, and crowding out those who are entitled to them. Formerly lawyers had a regular place assigned for their own exclusive convenience, just as the judges and the juries had. This was esteemed necessary and proper. The spectators also had suitable places assigned to them. But of late years the public, finding their places too small or not entirely comfortable, have quietly taken possession of the bar, and the members of the profession actually are crowded out of our court-houses. In several of the cities, at least, when any cause of interest is on trial, the seats in the bar are all occupied by those who have no more right to them than they have to the jury seats. Lawyers are officers of the court, and are as necessary to the business as are jurymen or even the judges, — why should they not have equal accommodations? And yet in the only instance where we have known members of the profession to complain of this grievance — for it is a real grievance — the judge read them a homily for calling the people a "rabble" — and this was all. We hope that learned judge may never be obliged to appeal to the bar for defence against this same rabble.

We do not intend to argue here, that the bar have a right to some sort of accommodation in our courts of justice. This question has been settled for an hundred years in this country, and dates with the common law in England; but we put it on the ground that the judges of our courts have a right to expect the presence and support of the bar upon occasions of great importance, and this they cannot count upon until some more stringent regulations are adopted in the particular above referred to.

But it may be said, that when members of the profession are not present, the seats in the bar may well be occupied by respectable citizens. Why not take the seat of the judge, when he happens to go out? Or perhaps the jurymen might sit closer, and allow some respectable citizen to sit with them. Why not? The truth is, citizens have no right in the bar at all, and the courts in our cities will never be attended by respectable members of the profession until suitable accommodations are provided, or until they may be sure of getting admittance when they attempt it. This may be considered a small matter. But we do not regard that as a trifling thing which virtually excludes a portion of the officers of the court from giving their attendance on occasions of great interest and excitement. Perhaps the subject will excite more attention after there has been some popular outbreak in the very temple of justice; some rescue, when the tipstaves are overpowered, or some

outrage towards the bench, when there is no bar to do their duty, and the judge vainly calls on "the people" for protection from an excited populace.

WESTERN LAW JOURNAL.—By an advertisement of Desilver & Burr, booksellers at Cincinnati, it appears that they propose to publish a periodical under the above title, to be exclusively devoted to jurisprudence. It will appear in monthly numbers, and its object will be to gather from, and diffuse among the lawyers of the west, whatever is most worthy of note in their profession. The publishers have secured the editorial services of Timothy Walker, Esq, late president judge of the ninth judicial circuit, and now professor of law in the Cincinnati college. Mr. Walker is a graduate of Harvard University, and began his legal studies in the law school attached to that institution, and in his professional career at the west, has acquired the reputation of a sound, enlightened, and learned jurist. He remained upon the bench long enough to show himself to be possessed of high judicial qualities, till he was displaced to make room for one of the dominant party. From what we know of Mr. Walker's abilities and learning, we confidently anticipate an interesting and valuable legal journal, and one in which the legal profession at the east will find much that is curious and instructive. It will appear in monthly numbers at three dollars per annum.

DIED, at the White Sulphur Springs, Virginia, on Sunday, August 27th, Hon. LEWIS SUMMERS, aged 64.

He was born on the 7th of November 1778, in Fairfax county, Va., being the eldest son of George and Ann S. Summers. His father was several times a member of the legislature of Virginia, as a delegate from Fairfax county. His mother, from whom he unquestionably derived many of the strong points of his character, only preceded him to the grave about five weeks. He entered upon the duties of active life during the presidency of the elder Adams, and attached himself to the party which bore Mr. Jefferson into the Presidential chair. To the political principles upon which he then acted, he ever afterwards adhered throughout his long and varied life, with undeviating firmness and constancy. In 1808 he removed to the West, settling for a short time in Gallipolis, Ohio, during which period he served for several years as a member of the senate in the legislature of that State. In 1814 he took up his residence in Kanawha county, where he has continued ever since to reside. In 1817–18 he served in the legislature of Virginia, and in February 1819, he was chosen one of the judges of the general court, and the judge of the Kanawha judicial circuit, then but recently created. For some time he was a member of the board of public works of Virginia, and in 1829 he was elected to the convention called to revise the constitution of Virginia. In all these relations his strong, original and vigorous mind has been indelibly impressed upon the times and the events with which he was connected. As a judge, he has been, for nearly twenty-five years, able, faithful, and laborious. As a statesman, his cares and his efforts have not ceased to be given to the promotion of the best interests of his country. Most of all that Virginia has accomplished in the great work of internal improvement may be ascribed to the perseverance and ability with which Judge Summers has continued, at all times and under every discouragement, to press this vital interest of the commonwealth upon the attention of the legislature and people. In that most remarkable assemblage of the age, the State Convention for the amendment of the Constitution of Virginia, which sat in 1829-30, the vigorous and practical character of Judge Summers's mind made him, before the close of its deliberations, one of the most useful, if not one of the most conspicuous members of that illustrious body. As the able champion of what he considered the true principles of elective government, he performed services and acquired a reputation which will ever cause his memory to be cherished with warm affection by the people of western Virginia.

But, distinguished as was the subject of this notice for his public worth, and for the substantial services which he has conferred upon his country, it is in private life that we behold the real worth, the highest excellence of his character. He was a devoted, affectionate, and considerate relative. His filial piety was especially remarkable. It was delightful to see this old man, venerable in age and illustrious in public service, the leader of senates and the official expounder of the laws of his country, tending, with the affectionate care and tenderness and solicitude of childhood upon the aged mother, who until a few short weeks ago still lived to receive and to expect the services of her child. As a brother, a friend, and in every other social relation, he was equally exemplary, affectionate, and constant.

Judge Summers was early imbued with pious feelings and with religious instruction by parental care and by the pastoral nurture of the rector of Christ church, Alexandria, by whom all the children of the parish were regularly catechised in the church. Although the peculiar evil of the times which succeeded undoubtedly exercised a hurtful influence upon him as upon most of his contemporaries, yet the impressions of that early age, as he has himself declared, were never effaced; and for many years past they have been felt in all their original distinctness and force, and have been deepening and strengthening.